STATE OF NEW JERSEY, Plaintiff, VS. KWESI GREEN, Defendant.	SUPREME COURT OF NEW JERSEY Docket No. 080562 Criminal Action On Appeal From: Superior Court of New Jersey, Appellate Division Honorable Clarkson S. Fisher Jr., J.A.D. Honorable Francis J. Vernoia, J.A.D. Honorable George S. Leone, J.A.D. (dissenting)

BRIEF OF PROPOSED *AMICI CURIAE* THE INNOCENCE PROJECT, INC., THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, AND THE INNOCENCE NETWORK

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INTEREST OF *AMICI CURIAE*

Amicus Curiae the Innocence Project is dedicated to providing pro bono legal and investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. The Innocence Project focuses on, *inter alia*, exonerating long-incarcerated individuals through DNA evidence. The advent of DNA testing and its use to challenge criminal convictions have provided scientific proof that wrongful convictions are not isolated or rare events. The Innocence Project has long studied the causes of these injustices and pursues legislative and administrative reforms designed to enhance the truth-seeking function of the criminal justice system--including preventing future wrongful convictions and identifying actual perpetrators. The Innocence Project thus serves as an important check on the power of the state and helps to ensure a safer and more just society by assisting in the apprehension of true perpetrators.

Included in the path-breaking work it has done, the Innocence Project has been an important player in exposing mistaken identification as a leading cause of wrongful convictions, contributing to more than 70% of overturned convictions. *See* Eyewitness Misidentification, Innocence Project, https://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited May 10, 2018). The Innocence

Project's extensive experience with mistaken eyewitness identification cases has led it to advocate for a variety of systemic reforms, including improving police procedures by requiring officers to adhere to scientifically supported "best practices," proposing model legislation, and highlighting the need for expert testimony and jury instructions to educate jurors about empirically-proven factors affecting the reliability of eyewitness identifications. In New Jersey, the Innocence Project played a critical role as *amicus curiae* in *State v. Henderson*, 208 N.J. 208 (2011), which established a comprehensive new framework for evaluating the reliability of out-of-identifications, including (as pertinent here) reaffirming the need for a complete record of the identification procedure.

Amicus Curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ") is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the New Jersey and United States Constitutions. Founded in 1960, the ACLU-NJ has more than 41,000 members; it is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for similar purposes, and has approximately 1,750,000 members nationwide.

The ACLU-NJ has long been a strong supporter and protector of the rights of criminal defendants, often participating as

amicus curiae in important cases like this one. *See, e.g.*, *State v. Zuber*, 227 N.J. 422 (2017) (extending U.S. Supreme Court limitations on life without parole for juveniles to sentences that are "the practical equivalent of life without parole"); *State v. Rosario*, 229 N.J. 263 (2017) (suppressing statements and evidence because the defendant was subject to an investigative detention without reasonable and articulable suspicion); *State v. Bryant*, 227 N.J. 60 (2016) (suppressing evidence found as a result of an impermissible search that "did not adhere to the rigorous standards for proceeding without a warrant under the protective sweep doctrine"); *State v. Coles*, 218 N.J. 322 (2014) (holding that a "warrantless consent-based search is objectively unreasonable and unconstitutional when premised on a defendant's illegal detention"); *State v. Skinner*, 218 N.J. 496 (2014) (holding "that the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged"). In particular, the ACLU-NJ has long fought for the right not to be convicted based upon suggestive or otherwise unreliable eyewitness identification testimony. *See State v. Jones*, 224 N.J. 70 (2016) (concluding that the defendant was entitled to a new trial when the identification procedure employed by law

enforcement was impermissibly suggestive, violating the defendant's due process rights).[1] In particular, the ACLU-NJ has specifically participated in cases addressing the importance of properly conducting, recording, and disclosing out-of-court identifications. For example, the ACLU-NJ was *amicus curiae* in *State v. Robinson*, 229 N.J. 44 (2017), which required the State to disclose contemporaneous records of out-of-court identifications as part of discovery in pretrial detention hearings. Likewise, the ACLU-NJ filed a brief *amicus curiae* in *State v. Joseph*, 212 N.J. 462 (2012), which concerned admission of out-of-court identification evidence where law enforcement failed to record and/or maintain so-called "mug shot books."

Amicus Curiae the Innocence Network is an association of organizations dedicated to providing *pro bono* legal and investigative services to wrongfully convicted prisoners. The 68 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as in Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system; drawing on the lessons from convictions of innocent persons, the Innocence Network studies

[1] The ACLU-NJ also advocated for and filed comments regarding proposed model jury instructions and court rules in the wake of *Henderson*.

and promotes reforms to enhance the truth-seeking function of the criminal justice system and to prevent future wrongful convictions.

The Innocence Network has helped to exonerate hundreds of individuals over the past two decades. From those experiences, the Innocence Network is well aware of the inherent unreliability of eyewitness identifications. The Innocence Network has submitted *amicus* briefs explaining the many risks associated with out-of-court identifications in courts across the country. *See, e.g.*, Brief for the Innocence Network as Amicus Curiae in Support of the Respondent, *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352), 2015 WL 254636; Brief of *Amicus Curiae* of the Innocence Network and Oregon Innocence Project in Support of Respondent Hickman, *State of Oregon v. Hickman*, No. SC S061409 (Or. Jan. 30, 2014), 2014 WL 1227589; Brief of *Amici Curiae* the Innocence Project and Innocence Network in Support of Application for Permission to File a Second Petition for Writ of *Habeas Corpus* in the District Court in Support of Petitioner, *In re: Troy Anthony Davis*, No. 08-16009-P (11th Cir. Nov. 12, 2008); *Amicus Curiae* Brief of the Innocence Network in Support of Petitioner's Rehearing Motion, In re: The Personal Restraint of Richard J. Dyer, No. 79872-9 (Wash. Sept. 2008).

This case presents the questions of whether *New Jersey Court Rule* 3:11 applies to an out-of-court identification obtained using the High Intensity Drug Trafficking Area ("HIDTA") database, as well as the proper remedy when law enforcement fails to preserve photos from an identification procedure constructed using the HIDTA database. Based upon their longstanding study of and advocacy with regard to out-of-court identification, the Innocence Project, the ACLU-NJ, and the Innocence Network seek to assist the Court to decide these issues, bringing to bear not only the plain language of *R.* 3:11, but also the history, science, and policy which underlie *Henderson*. For the reasons set forth below, the Court should affirm in part and reverse in part the decision of the Appellate Division and hold that the HIDTA database falls within the scope of eyewitness identifications addressed by *R.* 3:11 and that suppression is the proper remedy where law enforcement fails to preserve photos from an identification procedure constructed using the HIDTA database.

BACKGROUND

On February 11, 2014, victim C.F. was robbed at a bus stop in Newark, New Jersey. *State v. Green*, No. A-4316-15T2, 2017 WL 6275910, at *1 (N.J. Super. Ct. App. Div. Dec. 11, 2017) (*per curiam*). A man approached her, pointed a gun at her chest, and took off with her pocketbook. *Id.* Soon thereafter, C.F. came to the Newark Police Department's Robbery Squad office and provided a description of the robber to Detective Donald Stabile, though Detective Stabile did not memorialize her description of the robber until later, after C.F. had made an identification. Transcript of Jan. 11, 2016 Testimony of Donald Stabile ("Stabile Test.") at 18:1-3; *Green*, 2017 WL 6275910, at *1. In accordance with C.F.'s description, Detective Stabile ran a search in what is known as the High Intensity Drug Trafficking Area ("HIDTA") database, a photo management system used by, among other law enforcement agencies, the Newark Police Department.

The HIDTA database uses the DataWorks Photo Manager System, "which incorporates photographs of individuals arrested in 17 counties or entities around New York City, Northern Jersey, [and] Pennsylvania. It's a vast system encompassing millions of photographs." Transcript of April 18, 2016 Testimony of Robert Vitale ("Vitale Test.") at 7:2-6. Law enforcement can search the HIDTA database for known suspects, using their name, date of

birth, and/or social security number, or unknown suspects, using such search parameters as their race, skin color, hair, weight, and facial hair. Stabile Test. at 12:12-25; *Green*, 2017 WL 6275910, at *1. The database allows law enforcement to identify photos of suspects and build photo arrays to show to eyewitnesses.

The HIDTA database has two modes: witness and investigative. Witness mode allows law enforcement to run a search for photos so that an eyewitness may identify a suspect. *Green*, 2017 WL 6275910, at *2. In witness mode, law enforcement determines how many photos appear on each page. *Id.* Beside each photo are three boxes--"yes," "no," and "possible"--which allow the eyewitness to signify whether the person is a suspect or possible suspect. *Green*, 2017 WL 6275910, at *2. At the end of the eyewitness's viewing session, witness mode generates a report that records the parameters law enforcement used to create the photo array, the photos that were displayed, how long each of the photos was displayed, and whether the eyewitness marked "yes" or "possible" for any of the displayed photos. Vitale Test. at 16:11-17:1-12; *Green*, 2017 WL 6275910, at *2.

Investigative mode, by contrast, provides greater information and search features, but does not generate reports that memorialize searches or the photos displayed. After running a search in investigative mode, the operator can right-

click on any photo to reveal, *inter alia*, the date of arrest, time of arrest, and name of the person depicted in the photo. Vitale Test. at 12: 8-19. Investigative mode also allows law enforcement to highlight a specific photo and generate other photos similar to the one highlighted. *Green*, 2017 WL 6275910, at *2. This helps law enforcement to build photo arrays to present to witnesses. Vitale Test. at 8:24-25-9:1-3; *id.* at 37; Stabile Test. at 13:18-22 (explaining that similar photo feature generates photos "[o]f the persons that you're looking to utilize as fillers for the photo array. So, then as you scroll through those fillers or those options, you'll pick your best five fillers. And then that's basically how you comprise a six-person photo array.").

In each mode, a particular photo can appear multiple times, depending on the number of times the individual was arrested in the various municipalities from which the database collects photos.[2] Br. on Behalf of Plaintiff-Movant State Of New Jersey in Supp. of Mot. for Leave to Appeal ("State Mot. Br.") at 11 ("There is no way to prevent the system from generating repetitive photographs of one individual."); Stabile Test. at 60:18-20 ("[S]ay, you've been arrested 10 separate times, it'll give me 10 separate pictures of you."); *Green*, 2017

[2] For example, Defendant Kwesi Green had "been incarcerated . . . approximately five times." Transcript of Jan. 11, 2016 Oral Argument/Decision at 12:2-6.

WL 6275910, at *11. In witness mode, because a report is generated that identifies each of the photos that the eyewitness viewed, law enforcement can determine whether the eyewitness was exposed to multiple photos of the same individual. *Id.* at *2. In investigative mode, however, the risk that a witness will be exposed to the same individual multiple times is even more pronounced: when the operator selects the similar photo feature, the originally highlighted photo remains on the screen while the remaining photos change from page to page, *id.*; the highlighted photo then serves as a reference from which law enforcement can identify similar-looking photos for an array, Vitale Test. at 44:18-25-45:1-22 (explaining that the highlighted photo serves as a "reference," resulting in "multiple viewings"). Because reports are not generated in investigative mode, the only manner in which the operator can save photos is by selecting the save function or printing out the photos. *Green*, 2017 WL 6275910, at *2.

In this case, Detective Stabile used only the HIDTA database's investigative mode. He began his search by entering the following criteria: "black male, dark brown skin, short hair, no facial hair, twenty to twenty-five years old, 130 to 150 pounds, and 5'7" tall." *Green*, 2017 WL 6275910, at *1. He did not memorialize his search criteria and since the search was run in investigative mode, the criteria were not saved in a

computer-generated report. *Id.* Detective Stabile was also unable to provide the number of photos that the database generated based on the search terms, testifying only that "[u]sually, it's a lot." *Id.*; Stabile Test. at 22:20-24 ("I don't recall an exact number . . . I can't give an exact number."). After the HIDTA database generated the search results, Detective Stabile told C.F. to click through the photo pages, each of which had six photos, and inform him if anyone looked "similar" to the person that robbed her. *Green*, 2017 WL 6275910, at *1. Detective Stabile then relocated to a nearby cubicle, while C.F. began reviewing the photos at a computer terminal near the officer who was typing up the incident report for her robbery. Stabile Test. at 13:12-24.

After an unknown amount of time passed, Stabile Test. at 44:20-21, C.F. alerted Detective Stabile that she had identified someone who looked like the person who she believed robbed her, *Green*, 2017 WL 6275910, at *1. Although he could have done so, Detective Stabile did not print the pages of photos that C.F. reviewed before she arrived at the page with the similar individual, the photo of the similar individual, or the other five photos which accompanied the photo of the similar individual. Stabile Test. at 28:18-22; *id.* at 35:15-18; *id.* at 56:18-22-57:1-17 ("Sure, I could have printed out however many pages she could have, but I didn't."). Additionally, Detective

Stabile did not identify how many pages of photos C.F. had reviewed before making her identification, though he could have done that as well, since the screen identifies the page number. *Id.* at 56:18-22.

Next, Detective Stabile used the investigative mode's similar photo feature to highlight the photo of the person who C.F. said looked similar to her robber. *Green*, 2017 WL 6275910, at *1. Detective Stabile again instructed C.F. to inform him if she saw the robber or anyone who looked similar. *Id.* at *2. On the very first screen of the updated results, C.F. said "this is the guy" and pointed to a photo of Defendant Green. *Id.* Detective Stabile then printed Mr. Green's photo, but not the photos of the other five individuals on the same screen, after which C.F. recorded a formal statement identifying Mr. Green, through his photo, as the robber. *Id.*

Mr. Green was indicted on June 26, 2014 and charged with first-degree robbery, N.J.S.A. 2C:15-1, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a). App. On Behalf Of Plaintiff-Movant State Of New Jersey In Support Of Mot. For Leave To Appeal at 1a-4a (Notice of Mot. to Suppress Identification). On May 15, 2015, Mr. Green moved to suppress the out-of-court identification on the ground that law enforcement failed to preserve relevant

photos from the identification procedure, as required by *State v. Delgado*, 188 N.J. 48 (2006). *Id.* at 5a. The trial court (Honorable Martin G. Cronin, J.S.C.) held an evidentiary hearing on the motion and heard testimony from C.F., Detective Stabile, and Robert Vitale, an employee of DataWorks Plus, which designed and operated the HIDTA database. *Green*, 2017 WL 6275910, at *2; Vitale Test. at 4:23-25.

In an oral decision, the court suppressed C.F's identification of Mr. Green because law enforcement failed to comply with *R.* 3:11, which mandates that law enforcement preserve the photos used during an out-of-court identification procedure, as well as *Delgado* and *State v. Earle*, 60 N.J. 550 (1972) (*per curiam*). *See generally* Transcript of Jan. 11, 2016 Oral Argument/Decision ("Decision Tr."). The court found that Detective Stabile could feasibly have preserved the relevant photos from the identification procedure, but that he had failed to do so. *Id.* at 47:15-21. At the very least, the court found, Detective Stabile could have printed the photo of the person that C.F. said looked similar to the robber, the five photos that accompanied the similar photo, and the five photos that accompanied C.F.'s identification of Mr. Green's photo. *Id.* at 21:7-25-22:1-5; *id.* at 43:16-25-45:1-8. Indeed, the court pointed out that Detective Stabile himself admitted that he could have printed out and saved these additional photos, but

did not. *Id.* ("He just had to [push the] print key, you know, another 11 times. And those--those printouts could have been maintained."); *id.* at 46:22-25 ("Once the officer printed the--the--once the--the defendant's image appeared together with other images, there is no argument that that's not feasible. He did it once, he can do it all the times."). Underscoring that *Earle*, *Delgado*, and *R.* 3:11 all require that law enforcement preserve the actual photos from the identification procedure, the court concluded that law enforcement had failed to explain its failure to do so in this case. Decision Tr. At 47:10-14; *id.* at 49:2-10. The court also noted that Detective Stabile's use of a simultaneous array, in which six photos were displayed on each page, violated the Attorney General's Guidelines and the recommendation of the Court in *Henderson*. *Id.* at 37:18-22. Accordingly, the trial court granted the defense motion to suppress the out-of-court identification of Mr. Green. *Id.* at 49:17-25-50:1-4 ("[T]he court acknowledges that there was a range of remedies the court could . . . impose here. [But], in view of the clear fact that the officer was--had the capability to print out the equivalent of the other six photographs in both the initial viewing and the viewing where the defendant was identified, and the officer inexplicably did not do that . . . I believe under the facts of this case, that the suppression of the out-of-court . . . identification is appropriate.").

On appeal, the Appellate Division concluded that the "[t]he plain language of *Rule* 3:11 does not limit its application to photo array identification procedures that include a known suspect, or exempt from the recordation requirements photo array identification procedures that do not include known suspects." *Green*, 2017 WL 6275910, at *8. The Appellate Division highlighted that its interpretation of "the plain language of *Rule* 3:11 is also consistent with the Court's longstanding policy of ensuring that criminal defendants are entitled to broad discovery." *Id.* at *10. In addition, the Appellate Division stressed that reading *R.* 3:11 to apply to the HIDTA database "also gives effect to the Court's concerns about identification procedures expressed in *Delgado* and *Henderson*," explaining that the database implicates concerns about multiple viewings, "mugshot exposure" and "mugshot commitment." *Id.* (citing *Henderson*, 208 N.J. at 255-56). The Appellate Division pointed out that:

> In the computer-based photo search employed here, there was a risk of mugshot exposure. Both Stabile and Vitale testified that an individual's photo could appear multiple times in a single search of the HIDTA database, depending on how many times the individual had been arrested and photographed. Further, Vitale testified that when an officer highlights a "similar" photo in investigative mode, the "similar" photo will continue to be displayed on each succeeding page that is viewed. This evidence permits the possibility that C.F. viewed defendant's photo prior to finally selecting his photo, making it difficult "to know whether the later identification stems from a memory

> of the original event or a memory of the earlier identification procedure." Id. at 255. The risk of such an occurrence reinforces the need for adequate recording procedures discussed by the Court in *Delgado, supra*, 188 N.J. at 63, 902 A.2d 888.
>
> [*Green*, 2017 WL 6275910, at *11 (footnotes omitted).]

The Appellate Division also held that the State's contrary interpretation of *R.* 3:11 "would create a void in the record of every case where mugshot exposure could affect the reliability of an identification." *Id.* at *11. As a result, the Appellate Division agreed with the trial court that the requirements of *R.* 3:11 apply to identifications obtained using the HIDTA database, *id.* at *12, but remanded for the trial court to consider the appropriate remedy in this case, since in the Appellate Division's view, the trial court's "decision to exclude C.F.'s out-of-court identification was made without a full consideration of the alternative remedies available under Rule 3:11(d), and without an explanation as to why suppression was the appropriate remedy under the circumstances presented." *Green*, 2017 WL 6275910, at *12.

Judge Leone dissented. Relying on *State v. Ruffin*, 371 N.J. Super. 371 (App. Div. 2004), *State v. Janowski*, 375 N.J. Super. 1 (App. Div. 2005), and *State v. Joseph*, 426 N.J. Super. 204 (App. Div. 2012), Judge Leone argued in dissent that the HIDTA database was simply a computerized mug book in which there

was no perpetrator and therefore no "incentive or opportunity for suggestiveness by the police." *Green*, 2017 WL 6275910, at *18 (Leone, J., dissenting). Disagreeing with the majority, Judge Leone interpreted *R.* 3:11's use of the phrases "photo array" and "photo lineup" to require the presence of a known suspect. *Id.* at *20-22. Judge Leone concluded that "[b]ecause use of a computerized or physical mug book to search for an unknown perpetrator does not carry the risk of police suggestiveness posed when investigating officers construct a photo array or lineup containing a known suspect, the majority opinion's ruling is equally unnecessary and unjustifiable." *Id.* Although Judge Leone noted that there may come a time when computerized mug book systems could effortlessly print or save the photos viewed, the determination of when that time has arrived must be made by the rulemaking process. *Id.*

On March 20, 2018, this Court granted the State's motion for leave to appeal in order to address the question of whether "an out-of-court identification obtained using the High Intensity Drug Trafficking Area (HIDTA) system [is] subject to the requirements of Rule 3:11, which governs the record of an out-of-court identification procedure." *Amici curiae* the Innocence Project, the ACLU-NJ, and the Innocence Network respectfully submit this brief, and request oral argument, to assist the Court in the resolution of that important issue.

ARGUMENT

I. RULE 3:11 APPLIES TO OUT-OF-COURT IDENTIFICATION PROCEDURES THAT USE THE HIGH INTENSITY DRUG TRAFFICKING AREA ("HIDTA") DATABASE AND LAW ENFORCEMENT MUST THEREFORE PRESERVE THE PHOTOS USED DURING THE IDENTIFICATION PROCEDURE.

The central question in this case is whether *New Jersey Court Rule* 3:11, which mandates that law enforcement preserve the photos used during an out-of-court identification procedure, applies to identifications obtained using the HIDTA database.[3] Despite the Court's longstanding and consistent position on the need to preserve photos used during an out-of-court identification procedure, the State argues that *R.* 3:11 does not apply to C.F.'s identification of Mr. Green because the HIDTA database is not a photo identification procedure at all. In particular, the State contends that the procedure conducted by Detective Stabile should not be classified as a "photo array" or "photo lineup" because Stabile did not have a suspect in mind when he utilized the HIDTA database. For the reasons set forth below, and those outlined in the Appellate Division's per curiam decision, the State's position should be rejected.

[3] Although not raised by the parties below, this case also implicates the issue of whether suppression is the appropriate remedy when law enforcement fails to contemporaneously record the dialogue between the eyewitness and the officer administering the identification procedure. *Amicus* ACLU-NJ addresses this precise issue in *State of New Jersey v. Ibn Maurice Anthony*, No. 079344, and *State of New Jersey v. L.H.*, No. 079974, which are also currently pending before this Court.

A. The Recordation Requirement of *R.* 3:11, which the Court Promulgated Following its Decisions in *Earle*, *Delgado*, and *Henderson*, Applies to Identification Procedures, Whether or Not a Known Suspect is Included

In 2012, against a legal backdrop which already mandated the preservation of photos used in an out-of-court identification procedure,[4] the Supreme Court adopted *R.* 3:11. The plain language of *R.* 3:11(a) makes clear that "[a]n out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a law enforcement officer shall not be admissible unless a record of

[4] Since 1972, this Court has required that law enforcement preserve photos used during an out-of-court identification procedure. Beginning in *State v. Earle*, the Court held that law enforcement should "make a complete record of an identification procedure if it is feasible to do so, to the end that the event may be reconstructed in the testimony . . . If the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited." 60 N.J. 550, 552 (1972) (*per curiam*). In 2001, even before *Delgado* and *Henderson*, and in accordance with *Earle*, the New Jersey Attorney General promulgated guidelines that specifically required that law enforcement preserve the order of the photos and the photos used during an array. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 2 (Apr. 18, 2001), www.state.nj.us/lps/dcj/agguide/photoid.pdf. ("Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition."). Five years later, in *State v. Delgado*, the Court warned against "a crabbed reading of *Earle*" and held that out-of-court identifications are inadmissible if law enforcement fails to compile a complete record of the identification procedure. 188 N.J. 48, 63 (2006). And in the Court's seminal opinion in *Henderson,* this Court reiterated that out-of-court identifications "must be recorded and preserved in accordance with the holding in *Delgado,* [188 N.J. at 63], to ensure that parties, courts, and juries can later assess the reliability of the identification." 208 N.J. at 252.

the identification procedure is made." It goes on to describe what that record must include: as pertinent here, "if a photo lineup, the photographic array, mug books or digital photographs used." *R.* 3:11(c)(5). The Report of the Supreme Court Committee on Criminal Practice confirms that this language was included because the rule "must cover the various technology used for photo lineups." Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-of-Court Identification Procedures and Addressing the Identification Model Charges at 22 (Feb. 2, 2012), http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2012/sccpcrevis2012.pdf. Likewise, in 2012 the Attorney General revised the Guidelines promulgated to law enforcement in order to stress the need to preserve the photos regardless of the technology used for the photo array, explicitly including a question in its model photo identification worksheet that asks: "Did you preserve the photo array, mug books or digital photos used?" Photo Array Eyewitness Identification Procedure Worksheet at 2, Eyewitness ID Guidelines, Attorney General Guidelines - Division of Criminal Justice, http://www.njdcj.org/agguide/Eye-ID-Photoarray.pdf. In sum, both the plain language of *R.* 3:11 and these extrinsic sources confirm that law enforcement must

preserve the photos from an identification procedure, including those from mug books and digital photographs.

The State, seeking to avoid the mandates of *Earle*, *Delgado*, *Henderson*, the 2001 and 2012 Attorney General Guidelines, and *R.* 3:11, argues that these authorities all used the phrases "photo array" or "photo lineup" to refer only to identification procedures that included a known suspect. State Mot. Br. at 15; Suppl. Br. on Behalf of Plaintiff/Appellant State of New Jersey ("State Suppl. Br.") at 43, 47. Unlike those authorities, the State argues, the HIDTA database search at issue here involved only an *unknown* perpetrator. State Suppl. Br. at 36; State Mot. Br. at 15. Thus, the State concludes, *R.* 3:11 does not apply in any case in which law enforcement obtains an out-of-court identification using the HIDTA database to search for an unknown perpetrator. State Mot. Br. at 14-22; State Suppl. Br. at 52.

The State's argument fails for three mutually reinforcing reasons: first, the State's approach ignores the rule's explicit reference to "mug books," which never include a known suspect. *See R.* 3:11(c)(5) ("[I]f a photo lineup, the photographic array, mug books or digital photographs used."). This reason, standing alone, is sufficient to reject the State's argument that *R.* 3:11 does not apply to HIDTA database identification procedures; after all, the HIDTA is, in essence, a digital mugbook. Second, and in direct opposition to the State's assertion, the legal

definition, ordinary meaning, and case law use of "photo array" and "photo lineup" all make clear that the phrases refer to both target-present and target-absent photo displays and a *known* suspect is therefore not required in order for an identification procedure to qualify as a "photo array" or "photo lineup." And third, interpreting "photo array" and "photo lineup" to exclude photo identifications obtained using technology like the HIDTA database from the scope of *R.* 3:11 would--by creating a massive exception to the rule--be a manifestly absurd result that the Court should avoid as a matter of standard statutory construction.

As a matter of rule interpretation, there can be no real question but that the phrases "photo array" and "photo lineup" refer to both target-present and target-absent photo displays. "The methodology employed when this Court interprets one of its rules mirrors the manner in which statutes are construed." *Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., L.P.*, 204 N.J. 569, 577 (2011). Where, as here, a phrase is undefined, courts look to the ordinary meaning of the phrase and read it in context with related provisions so as to give sense to the court rules as a whole. *Wiese v. Dedhia*, 188 N.J. 587, 592 (2006) (citing *DiProspero v. Penn*, 183 N.J. 477, 492 (2005)). When the language of the rule is clear, "the inquiry ends, because 'the sole function of the courts is to enforce

[the rule] according to its terms.'" *IE Test, LLC v. Carroll*, 226 N.J. 166, 180 (2016) (quoting *Velazquez ex rel. Velazquez v. Jiminez*, 172 N.J. 240, 256 (2002)). In other words, "[i]t is not the function of this Court to 'rewrite a plainly-written [court rule] or presume that the [Court] intended something other than that expressed by way of the plain language.'" *DiProspero*, 183 N.J. at 492 (quoting *O'Connell v. State,* 171 N.J. 484, 488 (2002)).

Here, the Court's task is a simple one because the legal and everyday definitions of "photo array" and "photo lineup" do not require the presence of a known suspect. *See, e.g.*, *State v. Moran*, 202 N.J. 311, 323 (2010) (consulting Black's Law Dictionary and an everyday dictionary to discern the ordinary meaning of a term). Thus, Black's Law Dictionary defines "photo array," a term that appears to have first been used in 1971, as "[a] series of photographs, often police mug shots, shown sequentially to a witness for the purpose of identifying the perpetrator of a crime." Photo Array, Black's Law Dictionary (10th ed. 2014); *see* Photo Lineup (also known as, "photo array" and or "photo display"), The Free Dictionary, http://legal-dictionary.thefreedictionary.com/Photo+Lineup (last visited May 8, 2018) ("A presentation of photographs to a victim or witness of a crime."). This legal definition is consistent with the everyday meaning of the terms "array and "lineup," with "array"

defined as "to set out for display or use; place in an orderly arrangement," and "lineup defined as "[a] line of people that is formed for inspection or identification." The American Heritage Dictionary of English Language 102, 1047 (3rd ed. 1996). Obviously, neither the legal definition nor the lay dictionary meaning of the phrases "photo array" or "photo lineup" require the presence of a known suspect.

The ordinary meaning of the phrases is also consistent with the manner in which "photo array" and "photo lineup" are used in the case law. Thus, for example, many of the studies cited by this Court in *Henderson* specifically reference both target-absent and target-present photo arrays or lineups, undermining any argument that "photo arrays" or "photo lineups" refer exclusively to target-present identification procedures. *Henderson*, 208 N.J. at 242 ("Most experiments manipulate variables, like the witness' and suspect's race, for example, and use target-present and target-absent lineups to test the effect the variable has on accuracy."); *id.* at 234 (discussing "target-absent arrays-lineups that purposely excluded the perpetrator and contained only fillers"); *id.* at 250 ("In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there."); *id.* at 260 (discussing "target-absent photo lineups"). Indeed, the Court in *Henderson*

considered the science very carefully, and while it could have drawn a distinction between target-absent arrays in the studies and in the real world, it did not do so. Similarly, the Oregon Supreme Court has specifically referred to target-present and target absent arrays or lineups and even provided a real life example of a target-absent identification procedure when summarizing system variables that influence out-of-court identifications:

> "Target-absent" refers to a lineup or photo array that does not contain the suspect. Target-absent lineups occur in actual practice when the police officials mistakenly fix their suspicion on an innocent person. Scientific research on target-absent lineups is particularly relevant to the reliability of identifications because nearly all wrongful convictions based on eyewitness misidentification result from target-absent procedures. That is so because when the target (the actual perpetrator) is present, misidentifications will generally implicate only known-innocent foils, and therefore be immediately recognized as mistakes.
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> [*State v. Lawson*, 352 Or. 724, 780 n.14 (2012).]

And a New York Court has noted that "it is unknown in the real world how many lineups are target absent . . . ." *People v. Smith*, 2 Misc.3d 1007(A), at *8 (Sup. Ct. 2004). Thus, directly contrary to the State's position, courts have, in considering the propriety of identification procedures, considered photo arrays and lineups whether or not they contain a known suspect.

Thus, the only way for the Court to credit the State's argument that the Rule and case law require the presence of a known suspect is to ignore the plain meaning of the language used and to violate age old interpretative canons and this Court's jurisprudence. The Court has consistently cautioned that it cannot "write in an additional qualification," *Craster v. Bd. of Comm'rs of Newark*, 9 N.J. 225, 230 (1952), yet that is exactly what the State's position--that the Court should import into the definitions of "photo array" and "photo lineup" the additional requirement that a known suspect be present--would require. Because the Court's "duty is to construe and apply the [rule] as enacted," *DiProspero*, 183 N.J. at 492 (quoting *In re Closing of Jamesburg High School*, 83 N.J. 540, 548 (1980)), the Court should decline the State's invitation to stray from the ordinary meaning of "photo array" and "photo lineup." *See also State v. Munafo*, 222 N.J. 480, 488 (2015) ("[A] court may not rewrite a statute or add language that the Legislature omitted.").

Finally, it would be illogical and unreasonable to construe the actions taken in this case as anything but an out-of-court identification procedure that is subject to the requirements of *R.* 3:11. *See, e.g.*, *State v. Nance*, 228 N.J. 378, 396 (2017) ("[I]t is axiomatic that statutory interpretations that lead to absurd or unreasonable results are to be avoided." (quoting

State v. Haliski, 140 N.J. 1, 9 (1995))). *Rule* 3:11 was adopted in order to ensure that "inherently unreliable" out-of-court identifications are conducted in a manner which minimizes the possibilities of misidentification. *See, e.g.*, *Henderson*, 208 N.J. at 218 ("Study after study revealed a troubling lack of reliability in eyewitness identifications."); *Delgado*, 188 N.J. at 60 (highlighting "the inherent danger of misidentification"); *United States v. Brownlee*, 454 F.3d 131, 141 (3d Cir. 2006) ("It is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers is proverbially untrustworthy.'" (quoting Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 30 (Universal Library ed., Grosset & Dunlap 1962) (1927))); *see generally* Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-of-Court Identification Procedures and Addressing the Identification Model Charges (Feb. 2, 2012), http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2012/sccpcrevis2012.pdf. Specifically, *R.* 3:11, by requiring that law enforcement create a complete record of the identification procedure, assists courts to exercise their gatekeeping functions and ensure that unreliable eyewitness identifications are not admitted. *See, e.g., Henderson,* 208 N.J. at 302 (emphasizing that "courts must carefully consider

identification evidence before it is admitted to weed out unreliable identifications"); *State v. Chen*, 208 N.J. 307, 311 (2011) (describing "the court's traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors"); *see generally State v. Romero*, 191 N.J. 59, 63 (2007) ("[I]dentification testimony is an area that warrants vigilant supervision.").

Certainly, *R.* 3:11's purpose of ensuring that courts may do their job of assuring that out-of-court identifications are reliable would be undermined by excluding target-absent procedures, including that which occurred in this case, from the reach of the Rule. *See, e.g.*, *State v. Morrison*, 227 N.J. 295, 308 (2016) ("We will not adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme."). Here, Detective Stabile entered information into the HIDTA database identifying the suspect's race, skin color, hair length, facial hair, age, weight, and height. *Green*, 2017 WL 6275910, at *1. Based upon the results derived from using these search parameters, C.F. was able to identify someone whom she believed looked similar to the robber. *Id.* Detective Stabile then used the investigative mode's similar photo feature to further narrow the search results. *Id.* Because of these specific, targeted actions, C.F. was able to

make an out-of-court identification. *Id.* at *2. The State's attempt to characterize this process as something other than a "photo array" or "photo lineup" leads to "a manifestly absurd result," one that threatens to render *R.* 3:11 a dead letter based upon changing technology. *See* Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-of-Court Identification Procedures and Addressing the Identification Model Charges at 22 (Feb. 2, 2012), http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2012/sccpcrevis2012.pdf ("The Committee agreed that this factor involving photo lineups must include references to photo arrays, mug books and digital photographs, as it must cover the various technology used for photo lineups."); *see generally Turner v. First Union Nat. Bank*, 162 N.J. 75, 84 (1999) (emphasizing that where an interpretation "would create a manifestly absurd result, contrary to public policy, the spirit of the law should control."). Because, as explained below, databases like HIDTA present precisely the type of risks of misidentification and suggestiveness that the Court has sought to address in, for example, *Henderson*, it would undermine the very purpose behind *R.* 3:11 to remove from its reach photo identification procedures, like those at issue here, that result from new

technology. Instead, the Court should hold that *R.* 3:11 applies to identifications obtained using the HIDTA database.

B. Because the Social Science Principles that Underlie *Henderson* Apply with Equal Force to Out-of-Court Identifications Obtained Using the HIDTA Database, Law Enforcement was Required to Comply with *R.* 3:11 and Preserve the Relevant Photos

One of the State's main arguments--and the contention at the heart of Judge Leone's dissent--is that when there is no known suspect, suggestiveness and improper influences affecting the out-of-court identification are impossible, as a matter of law. State Mot. Br. at 14 (quoting Green, 2017 WL 6275910, at *24 (Leone, J., dissenting)); State Suppl. Br. at 44. Specifically, the State asserts that "there is no opportunity for police suggestiveness where there is no known perpetrator, and the photos viewed by the witness are randomly generated by the HIDTA system." Id. at 21. But this argument ignores not only the law, as announced by this Court in Henderson, but also the scientific principles upon which the Henderson Court relied, discussed below, all of which apply with equal force to law enforcement's use of the HIDTA database to obtain out-of-court identifications. These principles, and the scientific sources upon which they rely, make clear that identification procedures can be suggestive or that witnesses can be unduly influenced such that their ultimate choice is not a product of their independent memory--whether or not the administrator has a known

suspect in mind. For this reason too, R. 3:11 applies to out-of-court identifications obtained using the HIDTA database.

1. Malleability of Memory

This Court's seminal decision in Henderson began by endorsing the well-established scientific evidence that memory is malleable. Henderson, 208 N.J. at 245. As the Court explained, memory can be understood as involving three stages: acquisition, retention, and retrieval. Id. At each of these three stages,

> [T]he information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather get[s] the gist of things and constructs a "memory" on bits of information . . . and what seems plausible. The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.
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> [*Henderson*, 208 N.J. at 246 (quoting Report of the Special Master) (internal quotation marks omitted).]

Most significantly, this Court has recognized that the malleability of memory leads directly to incorrect eyewitness identifications. *See, e.g.*, *Henderson*, 208 N.J. at 234 ("Most misidentifications stem from the fact that human memory is malleable; they are not the result of malice."); *id.* at 218 ("We are convinced from the scientific evidence in the record that

memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications."); *id.* at 247, 283. Even more specifically, the malleability of memory has direct consequences for identifications obtained using the HIDTA database. Thus, two studies identified by the Court in *Henderson* outline the way in which target-absent arrays can lead to the identification of innocent persons. *See Henderson*, 208 N.J. at 233-34 (citing Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58 (1985); John C. Brigham, *et al.*, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. Personality & Soc. Psychol. 673 (1982)). In those studies, despite the absence of the actual suspect, 36% of eyewitnesses picked innocent fillers. *Id.* In other words, "[the] field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent suspect more than one-third of the time." *Id.* Similarly, a 2007 meta-analysis of 94 experiments from 49 published studies revealed that an innocent person was selected 34.5% of the time in target-absent lineups. Steven E. Clark, *et al.*, *Regularities in eyewitness identification*, 32 Law & Human Behavior 187, 190-92 (2008). These studies provide evidence that an eyewitness participating in a HIDTA database identification procedure, which will often

be a target-absent array, will often select an innocent suspect. To exclude target-absent identification procedures from the Rule would, then, be entirely disloyal to the Court's analysis in *Henderson*.

2. Multiple Viewings

The HIDTA database identification procedure also implicates multiple viewings, a system variable over which the criminal justice system has control. In *Henderson*, the Court explained that "[v]iewing a suspect more than once during an investigation can affect the reliability of the later identification [because] successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." 208 N.J. at 255. That is, the inherent suggestiveness of a repeated photo may nonetheless lead the eyewitness to make an identification. *See* Nancy K. Steblay, *Double Exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy*, 27 Applied Cognitive Psychology 644, 654 (2013) ("An eyewitness viewing a second procedure with the same suspect may believe that the suspect's presence in both procedures suggests that authorities believe the suspect is the perpetrator."); *see also* Gary L. Wells & Deah S. Quinlivan, *Suggestive eyewitness identification procedures and the supreme court's reliability test in light of eyewitness science: 30*

years later, 33 Law and Human Behavior 1, 8 (2009) ("[T]he procedure is highly suggestive to the extent that the witness can discern which person is common to both photo-lineups."). An identification procedure that involves more than one viewing of the suspect creates the risk of what has been termed "mugshot exposure," which is when an eyewitness initially views a set of photos and makes no identification, but later selects someone who had been depicted in the initial set of photos. *Henderson*, 208 N.J. at 255-56; *see Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 328 (3d Cir. 2016) ("Allowing a witness to view a suspect more than once during an investigation can have a powerful corrupting effect on that witness' memory." (McKee, J., concurring)).

A related concern, "mugshot commitment," occurs "when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, 'a significant number' then 'reaffirm[ ] their false identification' in a later lineup--even if the actual target is present." *Henderson*, 208 N.J. at 255-56 (quoting Gunter Koehnken *et al.*, *Forensic Applications of Line-Up Research, in* Psychological Issues in Eyewitness Identification 205, 218 (Siegfried L. Sporer, *et al.*, eds., 1996)). Indeed, mugshot commitment has particularly detrimental effects when an eyewitness makes an erroneous out-

of-court identification to which she later remains committed during an in-court identification procedure. *See* Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures With the Same Suspect*, 5 J. of Applied Res. in Memory & Cognition 284, 287 (2016) (hereafter "Steblay & Dysart").

A review of the science and various studies, published since *Henderson* was decided, confirms the Court's conclusion that multiple viewings can irreparably comprise an eyewitnesses identification. *See generally* Steblay & Dysart at 284-89. According to the review, repeated identification tasks in which the witness is exposed to multiple pictures of the same individual violate the basic premise that eyewitness evidence must be based on the witness's original memory of the crime because "there is no means to untangle the exposure to the prior identification task(s) from the witness's original memory of the crime." *Id.* The review points out that twenty-five years of research has shown that "witnesses are significantly more likely to choose a previously viewed innocent suspect when that innocent suspect appeared in both the mugshots and the photo array or lineup." *Id.* at 285-86 (citing Kenneth A. Deffenbacher, *et al.*, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287, 306 (2006)); *see also* Charles A. Goodsell, *Effects of mugshot commitment on*

lineup performance in young and older adults, 23 Applied Cognitive Psychology 788, 798 (2009) ("Mugshot exposure led to high rates of incorrect identifications as well as incorrect lineup rejections."). The review also highlights the expert consensus "that exposure to a suspect's photograph increased the likelihood that a witness would choose the suspect from a subsequent photo array or lineup." Steblay & Dysart at 286 (citing Saul M. Kassin, *et al.*, *On the "general acceptance" of eyewitness testimony research: A new survey of the experts*, 56 Am. Psychologist 405 (2001)); Steblay & Dysart at 286 (survey of 160 judges showing that 78% believe the mugshot-induced bias phenomenon to be "generally true" (citing Richard A. Wise & Martin A. Safer, *What US judges know and believe about eyewitness testimony*, 18 Applied Cognitive Psychology 427 (2004)).

Based on memory and eyewitness science, Drs. Nancy K. Steblay and Jennifer E. Dysart recommend that law enforcement avoid repeated identification tasks that use the same suspect. Steblay & Dysart at 286. Drs. Steblay and Dysart also strongly recommend "that *all* identification tasks that expose a suspect to an eyewitness should be recorded in detail by law enforcement":

> A record of the first identification attempt is critical. If the witness, at a first attempt, rejects the police suspect, chooses a photo array or lineup

> filler or expresses uncertainty about a suspect identification, this should be highly informative for the police investigation and triers-of-fact. Furthermore, without detailed information about the initial procedure, later identification evidence may be deceptive: appearing to be of higher quality and more compelling to triers-of-fact than the reality. Indeed, a witness's failure to identify the suspect (*e.g.*, a photo array or lineup rejection, or a filler pick) at any point during repeated procedures is critical *exculpatory* evidence.
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> [*Id.* at 286-87 (citations omitted) (emphasis in original).][5]

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[5] Drs. Steblay and Dysart also raise significant concerns about in-court identifications that follow out-of-court identification procedures in which the eyewitness was exposed to multiple photos of the same individual. In particular, the authors stated:

> We note a particular problem: in-court identifications. An in-court identification is inherently suggestive, tantamount to a high-pressure show-up. It is true that a witness *could* identify the defendant in court from original memory of the crime, but it is also likely that the in-court identification is the result of an error of familiarity (source confusion), commitment to a prior identification decision, and/or simple deduction on the part of the witness. (Who else will the witness point to, other than the defendant?) Hence, an attempt by an eyewitness to identify the perpetrator in court based on "memory of the crime" should be viewed with skepticism.
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> [Steblay & Dysart at 287 (emphasis in original).]

Because courts cannot untangle a suggestive out-of-court identification from a later in-court identification, *amici* agree with scholars and social scientists that "[i]f the prior procedures were suggestive, then, at minimum, the courtroom identification should be *per se* excluded." *Id.* at 287 (quoting Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 497 (2012)); *see also State v. Dickson*, 322 Conn. 410, 415 (2016) ("We conclude that . . . in cases in which identity is an issue, in-court identifications that are not preceded by a

These principles have particular applicability here: HIDTA database identification procedures are likely to expose eyewitnesses to multiple, and possibly numerous, photos of the same individual. Indeed, both Detective Stabile and Robert Vitale testified that the HIDTA database would expose an eyewitness to the same suspect multiple times. Detective Stabile explained that if an individual was "arrested 10 separate times, [the HIDTA Database will] give me 10 separate pictures of [the individual]." Stabile Test. at 60:18-20; *see also* Vitale Test. at 34:9-12 ("Q. Is there a way in either witness or investigative mode where, let's say, you could prevent repetitive photos of one person from coming up? A. No, I don't see how you can do that."). Thus, the HIDTA database may very well have caused Mr. Green's photo to appear multiple times. As a result, there was at least the significant risk that C.F.'s identification of Mr. Green was based upon the

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successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." (footnotes omitted)); *Com. v. Collins*, 470 Mass. 255, 265 (2014) ("[W]here a witness before trial has made something less than an unequivocal positive identification of the defendant during a nonsuggestive identification procedure, we shall . . . admit the witness's in-court showup identification of the defendant only where there is 'good reason' for it."); *Com. v. Crayton*, 470 Mass. 228, 245 (2014) ("In this case, there was no 'good reason' for the highly suggestive in-court identifications . . . where the Commonwealth had abundant opportunity to attempt to obtain a far less suggestive out-of-court identification through a lineup or photographic array.").

repetition of his photo, and the phenomenon of mugshot exposure or mugshot commitment, rather than upon her original memory of the robbery.

The State, however, seeks to dismiss these concerns by, borrowing from Judge Leone's dissent, arguing that *Henderson*'s discussions of "mugshot exposure," "mugshot commitment," and multiple viewings "did not concern a witness' initial search through physical or computerized mug books, but the 'later lineup procedure[s]' involving known suspects where police suggestiveness might occur." State Mot. Br. at 21-22 (quoting *Green*, 2017 WL 6275910, at *18-19 (Leone, J., dissenting)); State Suppl. Br. at 45-47. The State takes the position that it would be impractical to eliminate the multiple photos of each individual from the HIDTA database; it also contends that there was no evidence that C.F. saw Mr. Green's photo more than once. State Suppl. Br. at 45-47; State Mot. Br. at 21-22.

The State's arguments are unavailing. The only way to conceptualize the HIDTA database procedure at issue is as two separate identification tasks. First, C.F. was asked to review numerous photos; based on that review, she selected a photo of someone who she believed looked similar to the robber. The second task began when Detective Stabile utilized the similar photo feature and refined the results, at which point C.F. identified Mr. Green's photo. Thus, the two-task procedure used

in this case is precisely the same as the multiple identification procedures discussed in *Henderson*, 208 N.J. at 255-56, and in the studies discussed above, *supra* at 33-37.

Indeed, even if it were the case that the HIDTA database searches here constituted a single identification task, a unitary photo array that exposes an eyewitness to multiple pictures of the same individual is arguably even *more* suggestive than two identification procedures that have the same effect. It is well-established that law enforcement must not include multiple photos of the same individual in a single array. *See, e.g.*, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 2 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf ("Include only one suspect in each identification procedure."); International Association of Chiefs of Police, Eyewitness Identification: Model Policy, Sept. 2010, https://static1.squarespace.com/static/58ae15bf197aea1e151279e0/t/58c2f9b9414fb5f3a7533837/1489172921942/International+Association+of+Chiefs+of+Police+EWID+Model+Policy.pdf ("[D]o not include more than one photo of the same suspect."); Sally Q. Yates, Deputy Attorney General, Memorandum for Heads of Department Law Enforcement Components, All Department Prosecutors: Eyewitness Identification: Procedures for Conducting Photo Arrays, U.S. Dep't of Justice, Jan. 6, 2017, https://www.justice.gov/file/

923201/download ("When selecting a photograph of the suspect for the photo array, the administrator should include only one suspect in each photo array regardless of the total number of photographs and regardless of whether multiple suspects fit the same description.").

In fact, a 1999 guide for law enforcement promulgated by the Department of Justice clearly states that, "[i]n selecting photos to be preserved in a mug book, the preparer should . . . Ensure that only one photo of each individual is in the mug book." U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement, Oct. 1999, https://www.ncjrs.gov/pdffiles1/nij/178240.pdf. *See also* Stephen J. Taylor, Director, Revised Model Eyewitness Identification Procedure Worksheets, State of New Jersey, Oct. 4, 2012 http://www.njdcj.org/agguide/Eye-ID-Memo.pdf ("It is critical to note in this regard that the administrator is responsible for preserving the photo array that was shown to the eyewitness. The array itself will therefore document how many photos comprised the array, whether at least five fillers were used, the ordering of the photos in the array, and whether only one photo of the suspect was in the array.").

The State, however, focuses on the procedural mechanism for the studies, the repeated identification tasks, State Mot. Br. at 21-22; State Suppl. Br. at 45-47, fundamentally ignoring the underlying problem, which is of multiple viewings of the same

suspect.[6] Indeed, this Court and others have recognized that multiple photos of the same individual render an identification procedure impermissibly suggestive. Thus, in *State v. Madison*, the Court's seminal 1988 decision, a detective administering a photo lineup showed an eyewitness twenty-four black-and-white photographs. 109 N.J. 223, 234-35 (1988). The detective then showed the eyewitness an additional 38 color photographs, "thirteen or fourteen of which depicted defendant as the center of attention at a birthday celebration held in his honor." *Id.* at 235. The Court held that "[i]t is the sheer repetition of defendant's picture that forces us to conclude that the out-of-court procedures were impermissibly suggestive." *Id.* at 234. *Madison* was, as the Court recognized, consistent with the decisions of many other courts which expressed concern about the repetition of the same individual's photo. *See United States v. Higginbotham,* 539 F.2d 17, 23 (9th Cir. 1976) (noting that "the repeated showing to a witness of photographic displays for the purpose of identification presents opportunities for

[6] Of course, the multiple viewing studies themselves assume that the first in a series of repeated identification procedures was conducted in an unbiased and fair way, meaning that, for example, such suggestive processes as multiple photos of the same individual did not take place. *See, e.g.*, Steblay & Dysart at 288 (highlighting that the first identification procedure "*must* have been conducted with an unbiased fair procedure" (emphasis in original)); *id.* at 284 ("The first eyewitness identification attempt is the one that counts and must have been conducted with a fair and unbiased procedure.").

abuse and due process problems"); *State v. Williams*, 203 Conn. 159, 175 (1987) ("We recognize that the inclusion of multiple photographs of a suspect in an array may be suggestive, because it increases the risk of misidentification." (citations omitted)); *State v. Miller,* 202 Conn. 463, 473 (1987) ("We have recognized that pictorial recurrence can be suggestive because it increases the risk of misidentification." (citation omitted)); *Commonwealth v. Mayo*, 21 Mass. App. Ct. 212, 216 (1985) ("We are mindful of the 'danger of misidentification' where a defendant's photograph is included in successive arrays shown to a witness." (citations omitted)), review den., 396 Mass. 1105 (1986); *People v. Williams,* 60 Ill. 2d 1, 10 (1975) ("We agree that the use of multiple, identical or obviously similar, photographs of the same person is normally an undesirable photographic identification procedure which may often be unduly suggestive."), *abrogated on other grounds by People v. Smith*, 183 Ill. 2d 425 (1998); *see also Duncan v. Commonwealth,* 322 S.W.3d 81, 96 (Ky. 2010) ("Repeatedly showing the picture of an individual" can have [an impermissible] focusing effect."); *United States v. Bagley*, 772 F.2d 482, 493 (9th Cir. 1985) ("The repeated showing of the picture of an individual, for example, reinforces the image of the photograph in the mind of the viewer."). Accordingly, this Court concluded "that the procedures followed in the out-of-court identification

of defendant were impermissibly suggestive due to the unnecessary inclusion of multiple photographs of the defendant." *Madison*, 109 N.J. at 239; *Henderson*, 208 N.J. at 240 (referencing *Madison*'s language regarding the "impermissible suggestive" nature of repetitive photos).

Testimony from multiple experts in a civil rights case highlights how suggestive it is to use two photos of the same individual in a single photo array. Thus, in *Mayes v. City of Hammond, IN*, the court specifically cited Michael Fleming, a detective with the Chicago Police Department for 23 years and a police practices expert for the defendants, for the proposition that "[t]here is no legitimate reason to show two pictures of the same person in one photo array[.]" 442 F. Supp. 2d 587, 604 (N.D. Ind. 2006). Another one of the defendants' experts, Dr. Ralph Edward Geiselman, testified that "it is important that only one photo of an individual suspect be utilized, whether in a mugbook or photo array, because to do otherwise would signal to the witness that there is something special about the person being shown more than once and it would be suggestive." *Id.* And Steven Rothlein, who worked for the Miami-Dade Police Department for 30 years, including as Deputy Director, testified that "showing two pictures of the same individual in a photo array could be extremely suggestive and lead to the witness identifying the photo as opposed to the assailant . . . . [I]n

all his years supervising and conducting photo arrays in Miami and working with police officers and police departments around the country, he had never seen a photo array employed with two pictures of the same individual." *Id.* Because the photo arrays in the case were not preserved, the court also emphasized that,

> Both experts and numerous [Hammond Police Department] detectives agreed that it was essential to maintain and preserve the photo array, so that the array could be scrutinized by the prosecutor and potentially the defense attorney to ensure it was not unduly suggestive. Preservation is important, particularly where there is an alleged positive identification and particularly where there are irregularities in the process.
>
> [*Id.* at 65.]

The studies, case law, and experts all confirm how multiple viewings can make an identification procedure impermissibly suggestive. Whether two identification tasks or one, the HIDTA database search at issue here posed just such multiple viewing problems. The State's and dissent's position would require the Court to conclude that suggestive identification procedures are acceptable because they occur in two phases rather than one. But this conclusion cannot be the law, at least in part because as the recent review of the science and various studies explained, "[t]here can be no correction for contaminated memory;" "[i]nitial identification tasks that are suggestive in structure (a show-up, a biased photo array or lineup) . . . are particularly dangerous for an innocent suspect" because "the

damage is done" and "the taint will carry over to subsequent identification decisions." Steblay & Dysart at 287. In sum, there can be no question but that the HIDTA database identification procedure here at issue raises precisely the same multiple viewings problems as concerned the Court in *Henderson*, and before.

Finally, the State's two remaining arguments, that it would be impractical to eliminate the multiple photos of each individual from the HIDTA database and that there was no evidence that C.F. saw Mr. Green's photo more than once, point up the very problem that is now before the Court. Thus, it is clear from the record that had law enforcement used HIDTA's "witness mode," a record of every photo displayed would have been created, and the Court and parties would now be able to review a report that identified the photos that were displayed--including whether there were multiple photos of the same individual--and how long each of the photos was displayed.[7] Vitale Test. at 16:11-17:1-12; *Green*, 2017 WL 6275910, at *2. The reason there is no evidence that C.F. viewed more than one

[7] Any software that law enforcement utilizes to display photos to eyewitnesses should have the capability to eliminate duplicate photos of the same individual. If it does not, law enforcement may still utilize the software to construct the array but, in order to satisfy the requirements of *R.* 3:11, *Delgado* and *Henderson*, the Court should require that officers print out the array and manually display the photos to the eyewitness to eliminate any prospect of multiple viewings.

photo of Mr. Green is because Detective Stabile failed to do just that. The State should not be able to use its failure to comply with the Rule to argue that the evidence is insufficient to sustain its position. The decision below should be affirmed.

3. Lineup Construction

Another system variable implicated by the HIDTA database identification procedure is "lineup construction." The Court in *Henderson* recognized that "[p]roperly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing." *Henderson*, 208 N.J. at 251. Hence, "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup." *Id.* (quoting Report of the Special Master). While a biased array inflates the eyewitness's confidence in her choice because the selection process seems easy, an array of look-alikes forces the eyewitness to examine her own memory. *Henderson*, 208 N.J. at 251. In addition, "lineups should not feature more than one suspect" because multiple suspects increase the chance of "lucky guesses" and make reliability difficult to assess. *Id.; see also* Wells & Quinlivan, 33 Law and Hum. Behav. at 7 ("A proper lineup has only one suspect (who might or might not be the culprit) and the remaining lineup members are fillers.").

Specifically, the use of mugshot searches "poses problems of suggestiveness and lack of reliability, especially in

consideration of the unknown base rate of guilty individuals included in mugshot searches and that mugshot searches are akin to all-suspect identification procedures where any individual selected could potentially become a prime suspect." Steblay & Dysart at 286. Lineup construction also implicates the concept of "relative judgment," which "refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory *relative* to other lineup members." *Henderson*, 208 N.J. at 234-35 (quoting Gary L. Wells, *The Psychology of Lineup Identifications,* 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original)). That is, if the actual perpetrator is not in the lineup or array, "people may be inclined to choose the best look-alike," which enhances the risk of misidentification. *Henderson*, 208 N.J. at 235.

The HIDTA database procedure conducted in this case poses multiple lineup construction problems that undermine the reliability of the out-of-court identification of Defendant Green. First, of course, there is--depending on which photos the database generated--at least the possibility that the identification procedure was suggestive, improperly highlighting one, or more, of Mr. Green's photos. But the Court and parties have no way of knowing because Detective Stabile failed to preserve the relevant photos. Second, the HIDTA database generates photos of numerous individuals, all of whom may be

suspects. Accordingly, HIDTA database identification procedures contravene the Court's requirement that "lineups should not feature more than one suspect." *Henderson*, 208 N.J. at 251. And third, Detective Stabile explicitly told C.F. to identify any photo that appeared "similar" to the true perpetrator. *See* Green, 2017 WL 6275910, at *1. This specific instruction encouraged the use of relative judgment, which this Court in *Henderson* found so problematic. *See Henderson*, 208 N.J. at 235 ("Relative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false--which are the product of reliable memories and which are distorted by one of a number of factors."). Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false--which are the product of reliable memories and which are distorted by any one of these factors. *Id.* at 234-35.

Moreover, all of the problems discussed above were exacerbated by Detective Stabile's decision to use the HIDTA database's investigative mode with C.F. Robert Vitale testified that "[investigative mode is] not designed for a witness because on many of those photographs, data is available with the photograph. And, generally, if there is a witness viewing these

photographs, you don't want any history with the particular client that they're looking at. That's why witness mode was created." Vitale Test. at 11:13-22. Indeed, Detective Stabile himself acknowledged that investigative mode was designed to help law enforcement construct six-pack photo arrays to print out and then display to eyewitnesses. Stabile Test. at 12:2-14:21. His decision to nonetheless employ a method that was designed for law enforcement and could expose the eyewitness to background information about an arrestee at the click of a computer mouse, Vitale Test. at 12:12-20, is alone fatal to the reliability of the identification. And, because the HIDTA database's investigative mode does not provide a report of the photos displayed, there is no way to know whether, and to what extent, lineup construction problems affected the identification at issue. *Cf. Henderson*, 208 N.J. at 277 ("When constructing photo lineups, officers should also '[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness'; '[v]iew the array, once completed, to ensure that the suspect does not unduly stand out'; and '[p]reserve the presentation order of the photo lineup' and the photos themselves." (quoting Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 2 (Apr. 18, 2001), www.state.nj.us/lps/dcj/agguide/photoid.pdf)).

* * *

In sum, the out-of-court identification of Mr. Green using the HIDTA database raises the very concerns about suggestiveness and reliability that the Court highlighted in *Henderson*, namely the fallibility of human memory, multiple viewings, lineup construction, and relative judgment. These system variables and related concepts can only be evaluated if law enforcement preserves the relevant photos. But because Detective Stabile did not preserve the photos here, the Court has no way of knowing how many times Mr. Green appeared in the identification procedure, whether C.F. failed to identify another photo of Mr. Green that she viewed, whether Mr. Green stood out from the photos she viewed, and whether she right-clicked on any of the photos to reveal background information about the arrestee. This information was necessary "to ensure that parties, courts, and juries can later assess the reliability of the identification," *Henderson*, 208 N.J. at 252. Such review is, as a result of law enforcement's action, impossible, rendering the procedure violative of *R.* 3:11 which, as set forth above, is applicable to identifications obtained using the HIDTA database. It only remains, then to determine the appropriate remedy for this violation.

II. LAW ENFORCEMENT'S FAILURE TO PRESERVE THE RELEVANT PHOTOS FROM THE HIDTA DATABASE IDENTIFICATION PROCEDURE RENDERED THE IDENTIFICATION INADMISSIBLE

In accordance with *Delgado, Henderson,* and *R.* 3:11(a), out-of-court identifications are inadmissible if law enforcement fails to preserve the photos from an identification procedure. Without access to the photos from an identification procedure, courts are unable to evaluate the reliability, and therefore admissibility, of an out-of-court identification. In addition, suppressing such identifications serves the twin purposes of (1) incentivizing law enforcement to adhere to the Rule, to this Court's decisions in *Earle*, *Delgado* and *Henderson*, and to the Attorney General Guidelines; and (2) preserving the integrity of the judicial process by not allowing convictions to be based upon unreliable eyewitness identification evidence. For these reasons, as discussed in further detail below, when law enforcement fails to preserve the relevant photos from a HIDTA database identification procedure, suppression of the out-of-court identification is the only proper remedy.

Initially, it bears remembering that due process itself underlies the requirement that courts "preclude sufficiently unreliable identifications from being presented." *Henderson*, 208 N.J. 208. at 303; *State v. James*, 144 N.J. 538, 562 (1996) (noting the defendant's "due process right to be protected from the introduction of unreliable identification evidence"); *see*

also Neil v. Biggers, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process . . . ."); N.J.R.E. 803(a)(3) (prior identification admissible "if made in circumstances precluding unfairness or unreliability").

And in order for courts to determine whether an out-of-court identification is reliable, there must be a complete record of the identification procedure. This Court's jurisprudence in that regard is "concerned about safeguarding evidence and enhancing the reliability of the truth-seeking function of the trial. That is why the Court ordered that law enforcement officers 'make a complete record of an identification procedure if it is feasible to do so, to the end that the event may be reconstructed in the testimony.'" *Delgado*, 188 N.J. at 60 (quoting *Earle*, 60 N.J. at 552). Indeed, in *Henderson* the Court highlighted that out-of-court identifications "must be recorded and preserved in accordance with the holding in *Delgado*, [188 N.J. at 63], to ensure that parties, courts, and juries can later assess the reliability of the identification." *Henderson*, 208 N.J. at 252. Absent such a record, courts are unable to determine whether suggestiveness infected the out-of-court identification procedure and thus, whether the identification is sufficiently reliable to be admitted at trial. A recent Appellate Division decision

summarized well the principles that emerge from this Court's case law:

> Compliance with the recordation requirements is an issue separate from whether defendant made a showing of suggestiveness under the *Madison* standard. The recording requirement "protects a defendant's rights allowing examination of whether the procedure was impermissibly suggestive." [*State v. Smith*, 436 N.J. Super. 556, 569 (App. Div. July 29, 2014)]. The *Delgado* requirements were intended to permit a defendant to obtain evidence of suggestiveness. Thus, it would be illogical to conclude that a defendant's failure to show suggestiveness precludes a hearing on whether the *Delgado* requirements were met.
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> [*State v. L.H.*, 2017 N.J. Super. Unpub. LEXIS 1955, *18, 2017 WL 3271960 (App. Div. Aug. 2, 2017).]

See also State v. Horvath, 2015 N.J. Super. Unpub. LEXIS 2707, *25, 2015 WL 7432507 (App. Div. Nov. 24, 2015) ("The significant problem in this case is that, as discussed above, the police failed to create the documentary record of the procedures, which would have enabled defendant and the court to assess whether there was evidence of suggestiveness."); *Smith*, 436 N.J. Super. at 569 ("The record requirement protects a defendant's rights allowing examination of whether the procedure was impermissibly suggestive."); Letter from Richard D. Barker, Esq., New Jersey State Bar Association Representative to The New Jersey Supreme Court Criminal Practice Committee, Dec. 9, 2011, at 2-3, http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2012/sccpcrevis2012.pdf (explaining that contemporaneous

recording of the identification procedure is a prerequisite for evaluating the admissibility of an out-of-court identification).

Rule 3:11, by its terms, requires suppression where law enforcement fails to create a complete record of the identification procedure: "An out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a law enforcement officer *shall not be admissible* unless a record of the identification procedure is made." *R.* 3:11(a) (emphasis added). This "record of the identification procedure" must include the photos used in the procedure, as contemplated by the Court's 1972 decision in *Earle*, 60 N.J. at 552. *See also Delgado*, 188 N.J. at 60, 64. *Rule* 3:11(c) further clarifies that the recordation requirement applies to "the photographic array, mug books or digital photographs used." And because the plain language of the Rule requires suppression where law enforcement fails to preserve the photos from the identification procedure, the Court's task here is an easy one. *See IE Test, LLC*, 226 N.J. at 180 ("If the statutory language is clear, the inquiry ends, because 'the sole function of the courts is to enforce [the rule] according to its terms.'" (quoting *Velazquez ex rel. Velazquez*, 172 N.J. at 256)).

Nor is this result contrary to *R.* 3:11(d). That sub-section of the Rule provides a trial court with a number of

options in the event that the record created "is lacking in important details." *R.* 3:11(d). But preserving photos from an identification procedure, which is the only way a court can examine whether the procedure was reliable and not impermissibly suggestive, can hardly be labeled a "detail."

Indeed, courts across the country have held that law enforcement's failure to preserve the photos from an identification procedure results in a presumption that the out-of-court procedure was impermissibly suggestive. *See United States v. Sanchez*, 603 F.2d 381, 385 (2d Cir. 1979) ("The only reliable way for a court to resolve that initial issue is to see the actual photographs, something which could easily be done were it not for the Government's failure to retain any record of the spread used. Since it is the Government's action which deprives the court of this essential evidence, it is the Government which must bear the resulting unfavorable inference. Therefore, in the absence of the actual photo spreads used, this court will assume that the pretrial identification procedure was impermissibly suggestive."); *Branch v. Estelle*, 631 F.2d 1229, 1234 (5th Cir. 1980) ("We therefore hold that in situations where the police fail to preserve the photographic array, there shall exist a presumption that the array is impermissibly suggestive."); *People v. Johnson*, 106 A.D.2d 469, 469 (1984) ("We agree that the failure of the People to preserve a record

of two photographic arrays presented to the victim within a month of the robbery gave rise to an inference that the arrays were suggestive."); *State v. Bauer*, 123 Wis. 2d 444, 456-57 (Ct. App.), vacated because law enforcement eventually found the photos, 127 Wis. 2d 125 (1985) ("We adopt the *Sanchez* rationale against permitting the state to prove the reliability of a photo identification with oral testimony. The risk of unreliable memories outweighs the remote possibility that officers or witnesses will accurately recall the details of lost photographs."); *State v. Young*, No. 95CA2126, 1996 WL 451365, at *5 (Ohio Ct. App. Aug. 5, 1996) ("We join the United States Second and Fifth Circuit Courts of Appeals in holding that the procedure is deemed impermissibly suggestive if the police fail to preserve the photographic array which was used to obtain an out-of-court identification."); *Grady v. Com.*, 325 S.W.3d 333, 354 (Ky. 2010) ("Accordingly, we hold that a rebuttable presumption is necessary: one that assumes that when materials used for a pre-trial lineup are lost before the defendant has an opportunity to scrutinize their content, those materials will be presumed to be unduly suggestive."). In New Jersey, too, where courts adhere to the comprehensive and stringent legal framework established by the Court in *Henderson* and *R.* 3:11(a), courts should *a fortiori* suppress out-of-court identifications when law

enforcement fails to preserve the photos from the procedure, as the law and the Rule require.

Further, to the extent that *R.* 3:11(d) applies here, excluding the out-of-court identification is still the appropriate remedy because only through exclusion will courts be able to fully deter future violations of the Rules of Court and the Supreme Court's case law and help maintain the integrity of the judicial system by ensuring that unreliable out-of-court identifications are not admitted as evidence. "The primary purpose of the exclusionary rule 'is to deter future unlawful police conduct' by denying the prosecution the spoils of constitutional violations." *State v. Badessa*, 185 N.J. 303, 310 (2005) (quoting *State v. Evers*, 175 N.J. 355, 376 (2003)); *see also State v. Johnson*, 118 N.J. 639, 651 (1990) (noting that "evidence obtained in violation of a defendant's federal- or state-constitutional rights is generally excluded as proof against the defendant"). The rule also serves "to ensure that police do not 'profit' from lawless behavior" "and to preserve the integrity of the courts by not providing a forum for tainted evidence." *State v. Herrerra*, 211 N.J. 308, 330 (2012) (citations omitted); *see Badessa*, 185 N.J. at 310-11 ("The exclusionary rule also 'advances the 'imperative of judicial integrity' and removes the profit motive from 'lawless behavior.'" (quoting *Evers*, 175 N.J. at 376)); *State v. Handy*,

206 N.J. 39, 45-46 (2011) ("In addition to deterrence, the exclusionary rule 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' and 'assur[es] the people --all potential victims of unlawful government conduct--that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'" (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting))).

Applying the exclusionary rule where law enforcement fails to retain the photos from a HIDTA database identification procedure--or, indeed, any identification procedure--furthers the rule's twin purposes of deterring police misconduct and preserving the integrity of the judicial system. First, suppression would send the needed signal that a violation of this Court's decisions in *Earle*, *Delgado*, and *Henderson*, as well as *R.* 3:11 and the Attorney General Guidelines, will not be accepted or tolerated. By contrast, failing to suppress identifications in these circumstances would create a perverse incentive for officers who may have created a suggestive array to take their chances and determine not to preserve the evidence, even though that would necessarily deprive defendants of the most important evidence to challenge the reliability of out-of-court identifications. But "[u]nder the exclusionary rule, 'the prosecution is not to be put in a better position

than it would have been in if no illegality had transpired.'" *State v. Smith*, 212 N.J. 365, 388-89 (2012) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)); *cf. State v. Shaw*, 213 N.J. 398, 413 (2012) (emphasizing that the purpose of the exclusionary rule "is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

Second, suppressing out-of-court identifications in these circumstances also ensures that courts do not become a forum for the introduction of unreliable evidence, and for the unjust convictions that follow therefrom. As this Court recognized in *Henderson*, "the very integrity of the criminal justice system and the courts' ability to conduct fair trials" is at stake in eyewitness identification cases. 208 N.J. at 219. Accordingly, the exclusionary rule is necessary to ensure that law enforcement complies with its photo preservation requirements, that only reliable eyewitness evidence is admitted at trial, and that courts safeguard every defendant's right to a fair trial.

Finally, the State's suggestion that the numerous troubling issues surrounding the identification procedure here--including multiple viewings, lineup construction and relative judgment--can be addressed by cross-examination or a jury instruction both misunderstands the Court's role and is entirely inadequate to

ensure that Mr. Green receives a fair trial. *See* Suppl. Br. on Behalf of Plaintiff/Cross-Respondent State of New Jersey at 21-35. It is for the court, not the jury, to determine whether the eyewitness evidence is sufficiently reliable to be admitted at trial. *See, e.g., Henderson,* 208 N.J. at 302 (emphasizing that "courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications"); *Chen,* 208 N.J. at 311 (describing "the court's traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors"); *see generally Romero,* 191 N.J. at 63 ("[I]dentification testimony is an area that warrants vigilant supervision."). Nor can the cross examination of Detective Stabile remedy the failure to provide the very evidence that would be necessary for that cross-examination to be effective; indeed, the Detective has already made clear that he does not remember the number of photos that the database generated based on his search terms, does not know how many pages of photos C.F. reviewed before making her identification, cannot say whether C.F. viewed multiple photos of Mr. Green, and did not maintain the photo of the person that C.F. said looked similar to the robber, the five photos that accompanied the similar photo, and the five photos that accompanied C.F.'s identification of Mr. Green's photo. *See, supra,* Background at 10-12; *see also Sanchez*, 603 F.2d at 385 ("Police officers cannot be expected to

recall in sufficient detail photographs whose major importance is that they are [n]ot photographs of the suspect. The only reliable way for a court to resolve that initial issue is to see the actual photographs, something which could easily be done were it not for the Government's failure to retain any record of the spread used."). Cross examination would, under the circumstances, accomplish very little.

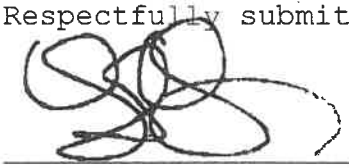
Nor would suppression impose an undue burden on law enforcement, given that Detective Stabile could easily have preserved the pertinent photos by using the HIDTA database's witness mode or by manually printing the photos in investigative mode. *See, supra,* Background at 10-12; *see also Delgado*, 188 N.J. at 61 ("Requiring the recordation of identification procedures, to the extent feasible, is a small burden to impose to make certain that reliable evidence is placed before a jury and that a defendant receive a fair trial."). In sum, there is no reason, when law enforcement fails to preserve the relevant photos as is expressly required by law, when that is required to assure fair judicial proceedings, and when it is readily done, not to suppress the resulting identification--both the out-of-court procedure and the ensuing in-court identification that flows naturally therefrom. Accordingly, the Court should reverse that aspect of the Appellate Division ruling that

overturned the trial court's ruling excluding the identifications obtained using the HIDTA database.

CONCLUSION

For the reasons set forth above, this Court should affirm the Appellate Division holding that *R.* 3:11 applies to out-of-court identifications obtained using the HIDTA database and reinstate the trial court's determination that suppression is the appropriate remedy when law enforcement fails to preserve photos from an identification procedure constructed using the HIDTA database.

Respectfully submitted,



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