Lawrence S. Lustberg (023131983)
Farbod K. Faraji (263272018)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

On Behalf of *Amicus Curiae*:

Alexander Shalom
American Civil Liberties Union of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

STATE OF NEW JERSEY, Plaintiff, VS. L.H., Defendant.	SUPREME COURT OF NEW JERSEY Docket No. 079974 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. **LETTER BRIEF OF PROPOSED *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal brief, pursuant to *R.* 2:6-2(b), on behalf of proposed *amicus curiae* the American Civil Liberties Union of New Jersey ("ACLU-NJ"). The interest of the ACLU-NJ in the above-captioned dispute is of long duration and is detailed in the Certification of Lawrence S. Lustberg in support of *amicus*'s motion to

participate, filed herewith. Proposed *amicus* respectfully submits this letter brief in support of Defendant L.H., incorporating as if fully set forth herein, and attaching for the Court's convenience its brief *amicus curiae* filed in *State of New Jersey v. Ibn Maurice Anthony*, No. 079344, which is also currently pending before this Court.

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BACKGROUND

On June 18 and July 23, 2011, an individual sexually assaulted two different women in Bloomfield Township, New Jersey. On August 4, 2011, the same individual attempted to sexually assault a third woman in Belleville Township. App. to State's Am. Pet. for Certification ("SA") at SA66-77 (Indictment); *see also State v. L.H.*, No. A-2878-14T3, 2017 N.J. Super. Unpub. LEXIS 1955, 2017 WL 3271960, at *1 (N.J. Super. Ct. App. Div. Aug. 2, 2017). Soon thereafter, one of the assault victims was asked to come into the Bloomfield Police Department to review fourteen different photo arrays: three arrays on June 21, 2011, four arrays on July 1, 2011, one array on July 5, 2011, one array on July 27, 2011, one array on July 28, 2011, one array on July 29, 2011, and three arrays on August 4, 2011. *See* SA1-61 (Identification Docs.); *see also* Tr. of Court's Decision on July 1, 2013 ("Decision") at T5 11-19.[1] Law enforcement documented the arrays by preserving the written instructions given to the eyewitness; the photos she was shown; police observations as to whether the witness in fact made an identification and regarding her demeanor; an account of whether the witness asked to see a photo more than once; and other brief comments about the witness's observation of the photos. *See*,

[1] The trial court misstated the dates of the arrays. *Amicus* derived the proper dates from the State's Appendix, SA 1-61.

e.g., SA34 ("The witness stopped on photo #4 and said that this picture is very very close but the picture is a little blurry."). Law enforcement did not, however, record the dialogue between the witness and the officers administering the identification procedures. Ultimately, the victim made no positive identification from any of the first fourteen photo arrays. Decision at T5 20-24.

On August 6, 2011, police questioned Defendant L.H. about the assaults. After falsely being promised that he would not be incarcerated, L.H. made admissions regarding the incidents on June 18, July 23, and August 4, 2011. *L.H.*, 2017 WL 3271960, at *3-5. Two days later, on August 8, 2011, the abovementioned victim was shown a fifteenth photo array and identified L.H. as the person who sexually assaulted her on June 8, 2011. *Id.* at 5:20-24. As in the fourteen previous arrays, the identification documents law enforcement preserved reflect only the written instructions given to the eyewitness, the photos she was shown, police observations regarding the witness's demeanor, and the witness's fill-in-the-blank response regarding her photo identification, *see* SA59 ("I identified photograph #3 [a]s being that of the guy who grabbed me and raped me behind the abandoned house on Franklin St. in June."); law enforcement again did ***not*** record the witness's dialogue with the officer or her statement of confidence in her identification of L.H. SA57-61.

On May 29, 2012, L.H. was indicted and charged with two counts of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); four counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3); three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a); and one count of first-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1 and 2C:14-2(a)(3). *L.H.*, 2017 WL 3271960, at *1.

L.H. moved to suppress the out-of-court identification on the ground that law enforcement failed to record--in any form--the dialogue between the officer and the eyewitness, as required by *State v. Delgado*, 188 N.J. 48 (2006). L.H.'s counsel argued that "there's a complete lack of documentation here" and requested a hearing to determine whether law enforcement failed to adhere to *Delgado*'s mandate to record the dialogue between the officer and the eyewitness, including the eyewitness's statement of confidence, in her own words. Decision at T4 5-12. In an oral decision, the trial court denied L.H.'s motion to suppress the out-of-court identification. Decision at T5 10-9:20. The court determined that "[f]or each array an identification packet was completed and preserved along with the photographs shown to the witness at the time the witness made her identification as well as the prior times when she was shown photo arrays. . . . The statement read from the identification

packets are reflected in the paperwork." *Id.* at T8: 1-11. The court acknowledged L.H.'s argument that "the police did not record or notate on any report what was exactly said to [the victim]," but nonetheless determined that "the defendant has failed to show any evidence of suggestiveness that could lead to a misidentification . . . ." *Id.* at 9: 1-13. Thereafter, L.H. pleaded guilty to two counts of first-degree kidnapping, two counts of first-degree aggravated sexual assault, and one count of first-degree attempted aggravated sexual assault. *L.H.*, 2017 WL 3271960, at *1. L.H. preserved his right to appeal the motions to suppress the identification and suppress his statement to police. App. to Def.'s Letter Br. Before the Appellate Division ("DA") at DA18-27 (Plea Form).

The Appellate Division reversed, determining that the trial court "erred by denying defendant's request for a hearing without first considering and making findings concerning law enforcement's compliance with *Delgado*'s recordation requirements, including whether compliance was feasible." *L.H.*, 2017 WL 3271960, at *7. In particular, the Appellate Division wrote that "[t]he court's factual findings . . . suggest that the packets did not include a verbatim account of the discussions between the officer and the victim, any showing that a verbatim account was not feasible, or if not feasible, a

detailed account of the identification." *Id.* at *6. The court explained that,

> 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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> [*L.H.*, 2017 WL 3271960, at *7.]

Accordingly, the Appellate Division remanded so that the trial court could determine whether the police complied with *Delgado*'s recordation requirements, including whether compliance was feasible. *Id.*

On March 26, 2018, this Court granted the State's petition for certification in order to address the question of whether "one victim's out-of-court identification [should] have been suppressed for failure to comply with the recording requirements of Rule 3:11 and the principles established in State v. Delgado, 188 N.J. 48 (2006)?"[2] *Amicus curiae* ACLU-NJ hereby submits this letter brief, and for the convenience of the Court, provides

[2] *Amicus* does not address the other issue certified by the Court, *i.e.*, whether "defendant's statement to police [was] obtained voluntarily where officers suggested that defendant would receive counseling and would not be jailed if he spoke with them . . . ."

the brief it submitted in *State of New Jersey v. Ibn Maurice Anthony*, No. 079344, which addresses the very same issue, in order to assist the Court in the resolution of the important question before it.

ARGUMENT

This case raises nearly the same issues explored by *amicus* in *Anthony*.[3] As in that case, law enforcement here failed to make a complete record of an out-of-court identification, specifically by failing to record the dialogue between the officer and the eyewitness, including the eyewitness's statement of confidence, in her own words. The requirement that this have occurred is well-established in New Jersey law. *See Delgado*, 188 N.J. at 51, 62-64 ("requir[ing], as a condition to the admissibility of out-of-court identifications, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure"); *State v. Henderson*, 208 N.J. 208, 252 (2011) ("Of course, all lineup procedures must be recorded and preserved in accordance with the holding in Delgado, [188 N.J. at 63], to ensure that parties,

[3] In *Anthony*, *amicus* also explored the application of *R.* 3:11, which became effective on September 4, 2012, to the identification in that case. Although the Rule is not, strictly speaking, relevant here, where the identification procedure at issue took place before the effective date of the rule, *amicus*'s analysis in *Anthony* is nonetheless relevant to the Court's inquiry here because, as the State noted in its brief before the Appellate Division, "*R.* 3:11 was born of the Court's holding in State v. Delgado." Pb21.

courts, and juries can later assess the reliability of the identification."); *see also R.* 3:11(a) ("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.").

This requirement derives from the concern, so well-supported by social science, that out-of-court identifications are "inherently unreliable." *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))). Although the unreliability of eyewitness identifications is well known in legal and psychological circles, "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony,* 88 Cornell L. Rev. 1097,

1141 n.7 (2003); *Henderson,* 208 N.J. at 27 (noting that jurors do not evaluate eyewitness identifications "in a manner consistent with psychological theory and findings" (quoting Brian L. Cutler, *et al.*, *Juror Sensitivity to Eyewitness Identification Evidence,* 14 Law & Hum. Behav. 185, 190 (1990))); Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 19 (1965) ("[I]n general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers."). The reasons for this, discussed at length by *amicus* in *Anthony* based upon the Court's decision in *Henderson*, is the inability of jurors to differentiate reliable from unreliable eyewitness identifications, and thus mitigate the risk of misidentification. This inability, as *amicus* has explained, derives from: (1) misconceptions about the operation of human memory; (2) the ease with which a witness's memory can be influenced; and (3) the propensity of witnesses to be overly confident in their identifications. *See* Br. of *Amicus Curiae* ACLU-NJ in *State v. Anthony* ("*Anthony* Br.") at 10-21 (citing *Henderson*, 208 N.J. at 218, 236-37, 272-74).

In order to protect against these kinds of juror misconceptions and to safeguard every defendant's right to a fair trial, New Jersey courts vigilantly exercise their gatekeeping functions to ensure that unreliable eyewitness identifications are not admitted as evidence. *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) (requiring consideration of evidence that private actors influenced eyewitness identifications "in light of 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.").

But courts cannot determine whether out-of-court identifications are reliable without a complete record of the identification procedure that took place. Thus, in *State v. Delgado*, this Court held that its constitutional obligation "to ensure the integrity of criminal trials" compelled it to mandate certain recordkeeping requirements for out-of-court identification procedures. 188 N.J. at 62. After highlighting both the prevalence of misidentifications stemming from out-of-court identifications and the limited ability of juries to properly weigh eyewitness evidence, *id.* at 60-61 & n.5, the Court announced:

> We now exercise our supervisory powers under Article VI, Section 2, Paragraph 3 to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court

> identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results. Preserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving either a picture of a live lineup or a photographic array. When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared. In the station house where tape recorders may be available, electronic recordation is advisable, although not mandated. Needless to say, the use of a tape recorder will minimize, if not eliminate, dueling testimony recounting what actually occurred at an identification procedure.
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> [*Id.* at 62-64 (footnotes omitted).]

See Henderson, 208 N.J. at 252 ("Of course, all lineup procedures 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."). Accordingly, this Court has declared in mandatory, rather than precatory, terms that if law enforcement does not record the "dialogue between the witness and the interlocutor," the out-of-court identification is inadmissible.[4] *See Delgado*, 188 N.J. at 62-64; *see also Anthony* Br. at 21-36.

[4] Guidelines issued by the Attorney General prior to *Delgado* included similar requirements. *See* Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 7 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf ("When conducting an identification procedure, the lineup administrator or investigator should: 1. Record both identification and

In accordance with this law, and in particular, with *Delgado*, as reinforced by *Henderson*, the out-of-court identification in this case should have been suppressed. Here, although the photo arrays were pre-arranged to take place at the Bloomfield Police Department, the detectives failed to create a video recording, audio recording, written verbatim account, or even a contemporaneous detailed summary of any of the fifteen identification procedures, including the August 8, 2011 array in which the eyewitness identified L.H. As a result, the Court and the parties were left unable to consider the dialogue between the officer and the eyewitness in assessing both the eyewitness's confidence in her identification and any possible suggestiveness in the procedure. *See Delgado*, 188 N.J. at 60 ("Moreover, the dialogue between a law enforcement officer and a witness may be critical to understanding the level of confidence or uncertainty expressed in the making of an identification and whether any suggestiveness, even unconsciously, seeped into the identification process."); *see also Anthony* Br. at 36-38.

Indeed, it is undisputed--and the State does not assert otherwise—-that law enforcement at no point memorialized the dialogue between the officer and the eyewitness in this case. Instead, the State focuses on that which law enforcement did

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nonidentification results in writing, including the witness' own words regarding how sure he or she is.").

memorialize, which included the written instructions given to the eyewitness, the photos shown to the eyewitness, police observations regarding the witness's demeanor, an account of whether the witness asked to see a photo more than once, and whether she in fact made an identification. State's Am. Pet. for Certification at 2-3, 7, 17-18. The State also erroneously claims that the identification reports contain, in the eyewitness's own words, how sure she was about her identification of L.H. *Id.* at 17-18. In fact, however, the report from the identification of L.H. does ***not*** include any statement of the eyewitness's statement of confidence. *See* SA 57-61. The record of the out-of-court identification procedure in this case, then, falls well short of the requirements mandated in *Delgado*.

Moreover, the State has not and cannot argue, on this record, that it was infeasible for law enforcement to adhere to the clearly established recordkeeping requirements for out-of-court identifications. The identification in this case was pre-planned--the police chose the time and date of the procedure and were able to enlist a "blind" detective to administer the procedure--and was conducted at the Bloomfield Police Department, which certainly contained video recording equipment in order to comply with *R.* 3:17, which requires that all custodial interrogations, in connection with certain crimes, be

electronically recorded. *See State v. Horvath*, 2015 N.J. Super. Unpub. LEXIS 2707, *25, 2015 WL 7432507 (App. Div. Nov. 24, 2015) ("We presume that the Kenilworth Police Department has access to video recording equipment, if for no other reason than to comply with *Rule* 3:17."). But even if, somehow, it was infeasible to video- or audio-record the identification procedure, law enforcement could readily have taken contemporaneous notes, thus "[p]reserving the words exchanged between the witness and the officer conducting the identification procedure," as required by *Delgado*, 188 N.J. at 63. Instead, and despite the minimal burden of thus creating a contemporaneous record, law enforcement completely failed to document the dialogue between the officer and the eyewitness, including the eyewitness's statement of confidence in her identification. *See 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[s] a fair trial."). *See also Anthony* Br. at 39-47.

The only appropriate remedy for this clear violation of the recordation requirements is suppression. That remedy is appropriate given the importance of the Due Process rights at stake, which underlie the requirement that courts "preclude sufficiently unreliable identifications from being presented."

Henderson, 208 N.J. 208. at 303; *see also 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"); *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").

In order for courts to fulfill their gatekeeping function of excluding unreliable out-of-court identifications, there must be a complete record of the identification procedure. *Henderson*, 208 N.J. at 252 ("Of course, all lineup procedures 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."). To that end, the Court in *Delgado* held that, "given the importance of ensuring the accuracy and integrity of out-of-court identifications, we will exercise our rulemaking authority to require, as *a condition to the admissibility* of out-of-court identifications, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure." 188 N.J. at 51 (emphasis added); *id.* at 63 ("We now exercise our supervisory powers under Article VI, Section 2, Paragraph 3 to require that, *as a*

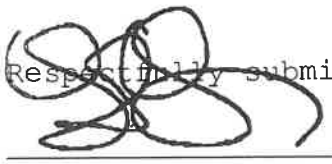
condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." (emphasis added)); *cf. R.* 3:11(a) ("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.").

Accordingly, under this Court's holding in *Delgado*, as well as the Rule which it spawned, the identification at issue cannot be admitted in the absence of precisely the record which was not maintained here. Indeed, the failure to provide that record deprived the trial court and the Appellate Division, and now deprives this Court, of the record necessary for it to properly determine the admissibility of the identification and thus to perform the critical gatekeeping function demanded of courts with regard to this uniquely critical out-of-court identification evidence. *See Anthony* Br. at 42-47. Accordingly, the decision of the Appellate Division should be affirmed.

CONCLUSION

For the reasons set forth herein, and those more fully explained in the attached brief filed in *State of New Jersey v.*

Ibn Maurice Anthony, No. 079344, this Court should affirm the decision of the Appellate Division and make clear that law enforcement's failure to record the dialogue between the officer and the eyewitness renders the resulting out-of-court identification inadmissible.



Respectfully submitted,

Lawrence S. Lustberg (023131983)
Farbod K. Faraji (263272018)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

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STATE OF NEW JERSEY, Plaintiff-Respondent, VS. IBN MAURICE ANTHONY, Defendant-Appellant.	SUPREME COURT OF NEW JERSEY Docket No. 079344 Criminal Action On Appeal From: Superior Court of New Jersey, Appellate Division Honorable Carmen H. Alvarez, J.A.D. Honorable Joseph F. Lisa, J.A.D.

BRIEF OF PROPOSED *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Lawrence S. Lustberg
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Edward Barocas
Jeanne LoCicero
Alexander Shalom
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

Counsel for Proposed Amicus Curiae

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INTEREST OF 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 in the State of New Jersey; 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. *See, e.g.*, *State v. Zuber*, 227 N.J. 422 (2017) (holding that courts must consider "youth and its attendant characteristics" as set forth in *Miller v. Alabama*, 567 U.S. 460 (2012), for 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 because the search "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"); *State v. Gaitan*, 209 N.J. 339 (2012) (concerning defendant's right to be informed about the deportation consequences of pleading guilty); *State v. Cahill*, 213 N.J. 253 (2013) (addressing speedy trial rights); *State ex rel A.W.*, 212 N.J. 114 (2012) (concerning the right of a juvenile defendant to have parent participation in a language he understands during a police interrogation); *A.A. ex rel. B.A. v. N.J. Attorney Gen.*, 189 N.J. 128 (2007) (addressing the constitutionality of DNA collection law); *State v. Fuller*, 182 N.J. 174 (2004) (holding that the defendant was denied a fair trial when the prosecutor used peremptory challenges to strike two jurors because of their religious clothing and missionary activity); *State v. Allah*, 170 N.J. 269 (2002) (holding that the defendant was denied effective assistance of counsel and was entitled to reversal of his conviction). Among the rights for which the ACLU-NJ has long fought is 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. Accordingly, 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) (Appellate Division decision at *State v. Joseph*, 426 N.J. Super. 204 (App. Div. 2012)), which concerned admission of out-of-court identification evidence where law enforcement failed to record and/or maintain so-called "mug shot books."

This case presents the question of the remedy to be applied when the State, in contravention of this Court's decision in *State v. Delgado*, 188 N.J. 48 (2006), as well as the language of *R.* 3:11 and its own Attorney General Guidelines, fails to contemporaneously record an eye witness's precise statements

[1] The ACLU-NJ also advocated for and filed comments regarding proposed model jury instructions and court rules in the wake of *State v. Henderson*, 208 N.J. 208 (2011), which established a new comprehensive framework for evaluating the reliability of such identifications, including (as pertinent here) reaffirming the need for contemporaneous recordkeeping of out-of-court identifications.

during an out-of-court identification procedure, here a photo array. Based upon its longstanding study of and advocacy with regard to this issue, the ACLU-NJ seeks to assist the Court to decide this issue, bringing to bear not only the plain language of the rule but also the history, science, and policy which underlie it. For the reasons set forth below, the Court should reverse the decision of the Appellate Division and hold that out-of-court identifications must be suppressed when law enforcement fails to record, in the witness's own words, the witness's statement of confidence and the verbatim dialogue between the witness and the officer administering the identification procedure.

BACKGROUND

On December 18, 2012, after playing cards and having a drink at his friend's house, Eugene Roberts was robbed in front of his own home. Tr. (May 19, 2015) at 55:1-8. Although his description of the incident has varied over time, the main details are as follows: between 2:00 and 3:00 AM, Roberts was approached by two or three black men who demanded his money. *State v. Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *3, 2017 WL 1244339 (App. Div. Apr. 5, 2017). The first of the three men pointed his revolver at Roberts and asked for his wallet. *Id.* After discovering that it contained no money, the second man asked for Roberts's car keys. *Id.* This man looked through

Roberts's car, but found nothing of value. *Id.* at *4. The gunman then told Roberts to kneel and face the car and put the gun to Roberts's head; he told Roberts not to look at him or turn around as he threw Roberts's keys on the ground and drove away with his co-conspirators. *Id.*; Tr. (Nov. 7, 2014) at 5:21-6:7. Roberts went into his home, told his wife about the incident, and called the police. *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *4.

Roberts went to the police station a few hours later and provided a formal statement. *Id.* His statement did not include any details about the suspects other than height, hairstyle, and the color of their clothes. Tr. (May 19, 2015) at 95:10-15. He was also unable to describe any suspect's complexion, face shape, eye color, or tattoos or moles. *Id.* at 79:25-81:25.

Two days later, on December 20, 2012, law enforcement called Roberts and asked him to come to the Newark Police Department to review a photographic array.[2] Tr. (Nov. 7, 2014) at 7:5-9. The array consisted of six black-and-white photographs of black men with dreadlocks or cornrows. *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *6. With respect to

[2] It is unclear precisely what was communicated to Roberts during the December 20, 2012 telephone call. That is significant: as a result, it is not known whether law enforcement used suggestive language--*e.g.*, "we believe we have identified one of your assailants"--when summoning Roberts to the police station.

Defendant Anthony, a photograph was used that was over a year old and did not reflect his appearance at the time of the incident. 19a-20a, 27a (Def.'s Mot. to Suppress, July 9, 2014) (noting that "Anthony's appearance had changed significantly over the course of a year: his hair style changed, his facial features filled out (not uncommon for a teenager growing into an adult), and the appearance of a prominent tattoo on the left side of his neck, containing script writing and extending from below his ear to the Adam's Apple of his neck"); *see also* Tr. (May 19, 2015) at 7:16-23. Detective Hannibal conducted the identification procedure in a Major Crimes Division interview room. Tr. (May 19, 2015) at 122:15-18. Before the identification, Roberts signed a pre-identification instruction form, but it does not appear that Detective Hannibal ever read the instructions aloud to Roberts. *See* Tr. (May 19, 2015) at 57:2-18; 14a (Photo Display Instructions, Newark Police Department). Roberts then identified Mr. Anthony as "[t]he man who asked me for my car keys." 16a (Photograph Identification Form, Newark Police Department). Detective Hannibal did not record her dialogue with Roberts or his precise statement of confidence; instead, she simply wrote that Roberts was "confident in his choice." 15a (Photo Display Report, Newark Police Department). The entire identification process lasted less than ten minutes.

Defendant Anthony was indicted on June 5, 2013 and charged with second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2, 2C:15-1(b); first-degree armed 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 handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a). Anthony moved pretrial to suppress his out-of-court identification based on the failure of law enforcement to contemporaneously record the identification process. *See* 26a[3] (Def.'s Mot. to Suppress, July 9, 2014) (citing *State v. Delgado*, 188 N.J. 48 (2006), and arguing that the form used "does not memorialize the dialogue that occurred between the witness and police before, during or after the viewing of the photo array. This is significant because police officers are strongly encouraged to utilize electronic recordation. Furthermore, the photo array was conducted in a Major Crimes interview room, with full access to both audio and video recordation, yet neither was performed. Without any record, there is no way of discerning whether unrecorded suggestive behavior occurred."). The trial court (Honorable Alfonse J. Cifelli, J.S.C.) acknowledged Anthony's argument, *see* Tr. (Nov. 7, 2014) at 7:25-8:3, but denied the

[3] Citations to "__a" refer the Appendix to Defendant's Brief before the Appellate Division.

motion without addressing why the omission did not warrant suppression.

Trial took place in May 2015, during which the State introduced evidence of the out-of-court identification; Roberts claimed he was "very confident" in his identification of Mr. Anthony from the photo array. Tr. (May 19, 2015) at 64:16 -25. This out-of-court identification was central to the case, as there was no physical or other corroborating evidence presented, other than an in-court identification by Roberts. *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *5. After trial, Anthony was found guilty of second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2, 2C:15-1(b) (Count One); first-degree armed robbery, N.J.S.A. 2C:15-1 (Count Two); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (Count Three); and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Four). *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *1. He was then sentenced to a 17-year term on Count Two, which was merged with Counts One and Four, and a concurrent 9-year term on Count Three. *Id.*

On appeal, Mr. Anthony again argued, *inter alia*, that law enforcement failed to comply with the requirements of *Delgado* when it did not contemporaneously record the identification process. Brief and Appendix on Behalf of Defendant-Appellant, Doc. No. A-5429-14T3, at 9-16. Despite acknowledging that

Henderson, *Delgado*, and *R.* 3:11 require contemporaneous recordkeeping, the Appellate Division affirmed the conviction, concluding that "[t]he record establishes that the out-of-court identification procedure was conducted appropriately and in accordance with all of the dictates of *Henderson* and Rule 3:11." *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *14-15. The panel emphasized that law enforcement properly filled out Newark Police Department's identification forms and the confidence Roberts expressed at trial in his out-of-court identifications. *Id.* at *9-14. The court also noted that the array was properly constructed, the detective was "blind," the instructions were thorough, and the witness understood them. *Id.* at *14. The court ultimately reasoned that because there was no record of suggestive actions taken by the police, the identification was admissible. *Anthony, 2017 N.J. Super. Unpub. LEXIS 832,* at *15 ("[W]e cannot conclude that the failure to record Roberts' actual words conveying that he was confident in his identification was a sufficient violation (if a violation at all) of *Delgado* and Rule 3:11 to warrant exclusion of the evidence.").

On October 20, 2017, this Court granted certification to address the question whether, as articulated on the Court's website, the defendant is "entitled to a new trial based on the police officer's failure to record verbatim the comments of the

witness while identifying defendant from a photographic array?" *Amicus curiae* the ACLU-NJ hereby submits this brief, and requests oral argument, to assist the Court in the resolution of that important issue.

ARGUMENT

I. LAW ENFORCEMENT'S FAILURE TO CONTEMPORANEOUSLY RECORD THE OUT-OF-COURT IDENTIFICATION VIOLATED THIS COURT'S PRECEDENTS AND THE RULES OF COURT AND REQUIRES THAT THE CONVICTION BE REVERSED.

A. Out-of-Court Identifications are the Most Dangerous Form of Evidence because of Jurors' Misconceptions about their Reliability.

As this Court recognized in its seminal ruling in *State v. Henderson*, at stake in this case is "the very integrity of the criminal justice system and the courts' ability to conduct fair trials." 208 N.J. at 219. That is because eyewitness identifications, like the out-of-court photo array at issue in this case, constitute the most powerful evidence that is ever presented at a trial. *Delgado*, 188 N.J. at 60 ("Eyewitness identification can be the most powerful evidence presented at trial, but it can be the most dangerous too."); *see also Henderson*, 208 N.J. at 219 ("[E]yewitness identifications bear directly on guilt or innocence."). Indeed, to a juror, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original) (quoting

Elizabeth F. Loftus, Eyewitness Testimony 19 (1979)). Thus, studies show that jurors consistently "overbelieve" eyewitness accounts, meaning "individuals' estimates of the accuracy of eyewitness identifications exceed actual identification accuracy rates." Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psychol. Pub. Pol'y & L. 817, 819 (1995); *Henderson*, 208 N.J. at 236 ("A 'fundamental fact of judicial experience,' Justice Marshall wrote, is that jurors 'unfortunately are often unduly receptive to [eyewitness identification] evidence.'" (quoting often *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting)) (alterations in original)); *see also* Brief for Amicus Curiae American Psychological Association in Support of Petitioner, *Perry v. State of New Hampshire*, 565 U.S. 228 (No. 10-8974), 2011 WL 3488994, at *17-18 (noting that "the magnitude of the overestimation was significant" where "the study's respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification." (citing Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983))); *Henderson*, 208 N.J. at 218 (noting that the old *Manson/Madison* standard "overstates the

jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate").

Thus, despite the persuasive power of eyewitness identification testimony, courts, psychologists and commentators have all determined that such evidence is "inherently unreliable." *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))). Accordingly, this Court, in particular, has recognized that "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *Delgado*, 188 N.J. at 60-61; *Henderson*, 208 N.J. at 218 ("[I]t is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country."); *id.* at 231 ("[T]he International Association of Chiefs of Police published training guidelines in which it concluded that '[o]f all investigative procedures employed by police in criminal cases, probably none

is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work.'" (quoting Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006))); *see also Benn v. United States*, 978 A.2d 1257, 1265-66 (D.C. 2009) ("These judicial pronouncements are supported by research studies that have concluded that 'eyewitness error is the leading cause of wrongful conviction in the United States.'" (quoting Elizabeth F. Loftus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* § 1-3, at 3 (4th ed. 1997))). In fact, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 Canadian Psychology 92, 93 (May 2001); *State v. Dubose*, 285 Wis.2d 143, 162-63 (2005) (recognizing that "research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined"). That is because, while the unreliability of eyewitness identifications is well known in legal and psychological circles, "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable."

Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell L. Rev. 1097, 1141 n.7 (2003); *Henderson*, 208 N.J. at 27 (noting that jurors do not evaluate eyewitness identifications "in a manner consistent with psychological theory and findings" (quoting Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990))); Patrick M. Wall, Eye-Witness Identification in Criminal Cases 19 (1965) ("[I]n general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers.").

As this Court has described at length in *Henderson*, the inability of jurors to differentiate reliable from unreliable eyewitness identifications, and thus mitigate the risk of misidentification, stems, in large part, from three factors: (1) misconceptions about the operation of human memory; (2) the ease with which a witness's memory can be influenced; and (3), as especially relevant here, the propensity of witnesses to be overly confident in their identifications. *See, e.g.*, *Henderson*, 208 N.J. at 236 ("[S]ome mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications."). First, jurors often believe that memory operates like a video recording, *see, e.g.*, Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, &

Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 195-96 (2006), and that witnesses are especially capable of remembering and recalling memories of stressful or traumatic events, *see, e.g.*, Charles A. Morgan III, et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 274 (2004). In reality, however, witnesses do "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 . . . ." *Henderson*, 208 N.J. at 246 (quoting Elizabeth F. Loftus, Eyewitness Testimony 21 (2d ed. 1996)). Moreover, scientific research has repeatedly demonstrated that witness identifications are less accurate in high-stress situations or when a weapon is present. *See Henderson*, 208 N.J. 208 at 261-63 (highlighting that high levels of stress and weapons-present events impair a witness's ability to make a reliable identification). Thus, a 2004 study found that "[o]nly three out of ten potential jurors correctly understood" that the presence of a weapon or violence renders an eyewitness's memory less reliable. Schmechel, O'Toole, Easterly & Loftus, *supra*, at 197. In sum, jurors cannot properly weigh eyewitness

identifications because they fundamentally misunderstand how memory operates.

Second, jurors' misconceptions about memory also diminish their ability to appreciate the ease with which a witness's memory can be influenced. Although the "[t]he body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications," *Henderson*, 208 N.J. at 247, jurors are either unpersuaded or unaware of these influences. For example, it is almost universally accepted that, to be reliable, identifications must be double blind--meaning the officer conducting the identification procedure does not know the identity of the suspect--and devoid of feedback on the witness's selection. *See, e.g., id.* at 248-50, 253-55; *see also* Daniel B. Wright, et al., *Turning a Blind Eye to Double Blind Line-Ups*, Appl. Cognit. Psychol. 24, 849-867 (2010). Yet studies show that prospective jurors do not discern a difference between the reliability of identifications that are double blind and those that are not. *Id.* at 849 ("Most people do not treat double-blind line-ups differently from non-double-blind line-ups when assessing the guilt of a defendant."); *see also* Dario N. Rodriguez and Melissa A. Berry, *Eyewitness Science and the Call for Double-Blind Lineup Administration*, Journal of Criminology, vol. 2013, Article ID 530523 ("[R]esearch frequently shows that

people are not sensitive to the influence of administrator blindness on eyewitness identification decisions."); Jennifer L. Beaudry, et al., *The effect of evidence type, identification accuracy, line-up presentation, and line-up administration on observers' perceptions of eyewitnesses*, Legal and Criminological Psychology (2015), 20, 346 ("[I]nformation regarding administrator knowledge had no influence on mock jurors' ratings of suspect guilt."). Similarly, prospective jurors do not appear to discount the reliability of identifications during which the witness received positive feedback; even when "some evaluators heard instructions about how feedback distorts witness confidence reports, these instructions only served to increase their favorability ratings of witnesses . . . ." Amy Bradfield Douglass, et al., *Does Post-identification Feedback Affect Evaluations of Eyewitness Testimony and Identification Procedures?*, Law Hum. Behav. (2010) 34:282-294; *see also* Beaudry, et al., *supra*, at 346 ("[O]bservers rated eyewitnesses who received confirming feedback, compared to disconfirming or no feedback, more favourably in terms of identification accuracy and other testimony relevant judgements."); *see also Henderson*, 208 N.J. at 274 ("The study revealed that mock-jurors 'were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup'

but 'gave disproportionate weight to the confidence of the witness.'" (quoting Brian L. Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence,* 14 Law & Hum. Behav. 185, 190 (1990))).

Jurors are also unaware of the more subtle ways in which a witness can be influenced. In *Henderson*, this Court explained that "[e]ven seemingly innocuous words and subtle cues--pauses, gestures, hesitations, or smiles--can influence a witness' behavior." 208 N.J. at 249. For example, one study noted that the interviewer's use of the phrase "smashed" as opposed to "collided, bumped, hit, or contacted" to describe an accident led test-witnesses to guess substantially different speeds for the cars involved. *Id.* at 246 ("Thus, a simple difference in language was able to cause a substantial change in the reconstruction of memory."). Another study found that 17% of test-witnesses would claim they saw a barn when interviewers casually mentioned one in a follow-up question, even though in reality there was no barn. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report,* 7 Cognitive Psychol. 560, 566 (1975). Jurors, as well as the witnesses themselves, do not comprehend the extent to which "memory is malleable" and can be influenced by an array of variables, including: suggestive interviewing and identification procedures conducted by law enforcement personnel; high levels of stress; the visibility of

a weapon; the use of alcohol or drugs; memory decay; changes in the culprit's facial features between the time of the event and the identification; the accuracy of prior descriptions of the culprit; and the level of confidence expressed in the identification. *See Henderson*, 208 N.J. at 248-267.

Finally, and also very significantly for this case, jurors erroneously place a great deal of weight on the confidence that eyewitnesses express in their identifications. Although jurors are normally able to discern "liars from truth tellers," scholars have warned that since eyewitnesses believe they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (*i.e.*, sincerely), he or she will not display the demeanor of the dishonest or biased witness." Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772 (2007). Eyewitness confidence is, therefore, "the most powerful predictor of verdicts," regardless of the presence of other variables. *Henderson*, 208 N.J. at 274 (quoting Brian L. Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185 (1990)).

Scholars and courts have repeatedly cautioned, however, that witnesses may be overly confident even in *false* identifications. This Court, for example, has concluded that

"[a] witness's level of confidence, standing alone, may not be an indication of the reliability of the identification." *State v. Romero*, 191 N.J. 59, 76 (2007). While highly confident witnesses may, in fact, produce more accurate identifications, it is difficult for prospective jurors to distinguish between well-founded confidence and confidence that is the product of suggestive identification procedures or other variables. *See Henderson*, 208 N.J. at 254 ("The Special Master found that eyewitness confidence is generally an unreliable indicator of accuracy . . . ."); *see also United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("An important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate and do not fade with time . . . The basic problem about testimony from memory is that most of our recollections are not verifiable. The only warrant for them is our certitude, and certitude is not a reliable test of certainty." (quoting *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296-97 (7th Cir. 1990))); *Brownlee*, 454 F.3d at 142-44 (highlighting that "'witnesses ofttimes profess considerable confidence in erroneous identifications'"). As this Court has recognized, even mistaken eyewitnesses can "exude supreme confidence in their identifications," *Henderson*, 208 N.J. at 236, and jurors fail to account for the fact that accuracy and confidence "may not be related to one another at all," *Romero*,

191 N.J. at 75 (quoting *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting)).

In order to preserve the integrity of the criminal justice system, courts must step in to protect against juror misconceptions and ensure that only reliable eyewitness identifications are presented at trial. *See, e.g.*, *Romero*, 191 N.J. at 75 ("We believe that particular care need be taken in respect of this powerful evidence--the eyewitness."). But in order to do so, courts must be provided with a full record of what actually occurred at out-of-court identifications that underlie any in-court identifications.

B. This Court's Precedents, as well as the Rules of Court, and Attorney General Guidelines Make Clear that Law Enforcement Must Make a Full, Contemporaneous Record of Out-of-Court Identification Procedures, Including the Verbatim Dialogue between the Police Officer and Witness.

In order to protect against juror misconceptions and safeguard every defendant's right to a fair trial, New Jersey courts vigilantly exercise their gatekeeping functions to ensure that unreliable eyewitness identifications are not admitted as evidence. *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) (requiring consideration of evidence that private actors

influenced eyewitness identifications "in light of 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."). Indeed, due process demands that courts "preclude sufficiently unreliable identifications from being presented." *Henderson*, 208 N.J. 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").

Of course, in order for courts to determine whether out-of-court identifications are reliable, there must be a complete record of the identification procedure. Thus, in *State v. Delgado*, this Court held that its constitutional obligation "to ensure the integrity of criminal trials" compelled it to mandate certain recordkeeping requirements for out-of-court identification procedures. 188 N.J. at 62. The Court explained that the "importance of recording the details of what occurred at an out-of-court identification flows from our understanding

of the frailty of human memory and the inherent danger of misidentification." *Id.* at 60. After highlighting both the prevalence of misidentifications stemming from out-of-court identifications and the limited ability of juries to properly weigh eyewitness evidence, *id.* at 60-61 & n.5, the Court announced:

> We now exercise our supervisory powers under Article VI, Section 2, Paragraph 3 to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results. Preserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving either a picture of a live lineup or a photographic array. When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared. In the station house where tape recorders may be available, electronic recordation is advisable, although not mandated. Needless to say, the use of a tape recorder will minimize, if not eliminate, dueling testimony recounting what actually occurred at an identification procedure. Tape recording will serve as much to protect the police from claims of improper conduct as it will to preserve evidence. Defendants will be entitled in discovery to any reports or tape recorded statements covering an identification procedure.

[*Id.* at 62-64 (footnotes omitted).]

See also id. at 60 ("Moreover, the dialogue between a law enforcement officer and a witness may be critical to understanding the level of confidence or uncertainty expressed in the making of an identification and whether any suggestiveness, even unconsciously, seeped into the identification process."). Accordingly, the Court declared in mandatory, rather than precatory, terms that if law enforcement did not record the "dialogue between the witness and the interlocutor," the testimony would be inadmissible.

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. After an exhaustive and indeed historic review of scientific research about human memory, in which the Court explained at length how suggestive police practices, witness errors, and juror misunderstandings all contribute to eyewitness misidentification, *see Henderson*, 208 N.J. at 283 ("[T]he science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications." (internal

quotations and citations omitted)); *id.* at 272-75 (noting that jurors "do not intuitively understand all of the relevant scientific findings"), this Court reiterated that "[i]n *Delgado*, *supra*, the Court directed that 'law enforcement officers make a written record detailing [all] out-of-court identification procedure[s], including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results.'" *Id.* at 241 (quoting *Delgado*, 188 N.J. at 63). The Court thus reinforced that contemporaneous recordkeeping provides courts and jurors with the necessary information to ferret out unreliable out-of-court identifications. *Id.* at 252. In particular, the Court underscored the concern that confirmatory feedback from law enforcement can distort memory and concluded that confidence "must be recorded in the witness' own words before any possible feedback." *Id.* at 254.

A recent Appellate Division decision summarized well the principles that emerge from this Court's jurisprudence on the subject:

> 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." [*See 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.
>
> [*State v. L.H.*, 2017 N.J. Super. Unpub. LEXIS 1955, *18, 2017 WL 3271960 (App. Div. Aug. 2, 2017).]

In sum, the failure to create a contemporaneous record of the identification procedure deprives the court and the parties of the information necessary to determine whether the identification was reliable and, therefore, admissible. *See 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."); *State v. Smith*, 436 N.J. Super. 556, 569 (App. Div. July 29, 2014) ("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).

Indeed, even before this Court's decisions in *Delgado* and *Henderson*, Attorney General John J. Farmer, Jr., in 2001, promulgated guidelines that specifically delineated the recording procedures that New Jersey law enforcement personnel must follow in order to "minimize the chance of misidentification of a suspect," Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf, and "ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence," Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors, et al., at 1 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf. Thus, the Attorney General provided detailed instructions for composing, conducting, and recording out-of-court identification procedures. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1-7 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

With respect to recording results, in particular, the Attorney General Guidelines required as follows:

Recording Identification Results

> When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings. When conducting an identification procedure, the lineup administrator or investigator should:
>
> 1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is.
>
> . . . .
>
> [*Id.* at 7.]

While this Court commended these Guidelines, it also highlighted that they were only a series of "best practices" because "[t]he Attorney General expressly noted that identifications that do not follow the recommended Guidelines should not be deemed 'inadmissible or otherwise in error.'" *Henderson*, 208 N.J. at 278 (quoting Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors, et al., at 1-2 (Apr. 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf). Therefore, this Court determined that it was required to step in to "guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials." *Henderson*, 208 N.J. at 278; *Delgado*, 188 N.J. at 62 ("We commend the Attorney General's Office for issuing guidelines intended to promote the

reliability of out-of-court identifications. However, this Court has the constitutional obligation through its supervisory role over the court system to ensure the integrity of criminal trials."); *Romero*, 191 N.J. at 74-75 ("[W]e commended the Attorney General for having improved pretrial identification procedures. However, when we perceive, as we do here, that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act." (citation omitted)).

Building upon the Attorney General's 2001 Guidelines, and in specific response to the decisions in *Delgado* and *Henderson*, this Court promulgated *New Jersey Court Rule* 3:11, which requires that, as a condition of admissibility, law enforcement contemporaneously record all the identification procedures. That Rule states, in full:

> **(a) Recordation.** 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.
>
> **(b) Method and Nature of Recording.** A law enforcement officer shall contemporaneously record the identification procedure in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be

made, a detailed summary of the identification should be prepared.

(c) Contents. The record of an out-of-court identification procedure is to include details of what occurred at the out-of-court identification, including the following:

(1) the place where the procedure was conducted;
(2) the dialogue between the witness and the officer who administered the procedure;
(3) the results of the identification procedure, including any identifications that the witness made or attempted to make;
(4) if a live lineup, a picture of the lineup;
(5) if a photo lineup, the photographic array, mug books or digital photographs used;
(6) the identity of persons who witnessed the live lineup, photo lineup, or showup;
(7) a witness' statement of confidence, in the witness' own words, once an identification has been made; and
(8) the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

(d) Remedy. If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

The plain language of *R.* 3:11(b) 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 the identification procedure is made." (emphasis added). It goes on to describe what that record must entail: "[a] law enforcement officer *shall* contemporaneously record the identification procedure" and "[w]henever a written record is prepared, it *shall* include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness." (emphasis added). This language derives from and echoes the Court's holding in *Delgado*, which "require[d], as a condition to the admissibility of out-of-court identifications, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure." 188 N.J. at 51. Thus, *R.* 3:11 reaffirms in mandatory--not precatory--terms that if law enforcement does not record dialogue between the witness and the officer, the testimony is inadmissible.

Although the Court need not resort to extrinsic sources like the Report of the Supreme Court Committee on Criminal Practice, or subsequent guidelines by the Attorney General, *see State v. Gandhi*, 201 N.J. 161 (2010) ("If the plain language leads to a clear and unambiguous result, then our interpretive process is over." (quoting *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189, 195 (2007))), they confirm that the factors set forth in *Delgado*--including the requirement

that, as a condition for admissibility, law enforcement record "the dialogue between the witness and the interlocutor"--"must be contained in the written record of an out-of-court identification and that the failure to record those factors would deem the identification inadmissible." 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 ("Committee Report"), at 8-9 (Feb. 2, 2012), http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2012/sccpcrevis2012.pdf; *id.* at 13-14 (explaining that "[t]he Committee agreed, without objection, that consistent with *Delgado*, the rule should provide that: '[t]he record of an out-of-court identification procedure shall include the details of what occurred at the out-of-court identification, including: . . . the dialogue between the witness and the officer who administered the procedure.'"). Indeed, the State endorsed the Committee's proposed rule language, including its reading that *Delgado* expressly conditioned admissibility of out-of-court identifications on recording the dialogue between the witness and the officer. Letter from Boris Moczula, Assistant Attorney General, on behalf of the Office of the Attorney General, to Supreme Court Criminal Practice Committee, at 4 (Jan. 9, 2012), http://www.judiciary.state.nj.us/courts/assets/supreme/reports/2

012/sccpcrevis2012.pdf (citing *Delgado*, 188 N.J. at 63). While the Committee's proposed language was adjusted and restructured, the final language of *R.* 3:11 contains the mandate that law enforcement record the dialogue between the witness and the officer. *R.* 3:11(b) ("A law enforcement officer *shall* contemporaneously record the identification . . . If a contemporaneous record cannot be made, the officer *shall* prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it *shall* include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness.") (emphasis added)).

Likewise, the Attorney General has revised the Guidelines promulgated to law enforcement in order to stress the need to record as many details as possible about the identification procedure, explicitly including the dialogue between the witness and the officer and the witness's statement of confidence, in the witness's own words. Specifically, the Attorney General's "Photo Array Eyewitness Identification Procedure Worksheet," dated October 1, 2012, seeks to ensure "that officers comply with all of the requirements for eyewitness identification procedures established by Court Rule and New Jersey Supreme Court case law." Eyewitness ID Guidelines, Attorney General Guidelines - Division of Criminal Justice,

http://www.njdcj.org/agguide/Eye-ID-Photoarray.pdf. The instructions for the worksheet acknowledge that:

> New Jersey law requires that law enforcement officers must contemporaneously record the identification procedure. This may be done in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is used, it must include, if feasible, a verbatim account of any exchange between the officer(s) involved in the procedure and the witness. When a written verbatim account cannot be made, a detailed summary of the identification procedure should be prepared which includes the dialogue between the officer(s) and the witness.
>
> . . .
> If the witness identifies a photo as depicting the perpetrator, the administrator must ask the witness to make a statement regarding his/her level of confidence that the photo depicts the perpetrator. The officer must document as detailed an account as possible of the exact words/gestures used by the witness. To ensure that the worksheet accurately documents the witness's stated level of confidence, the administrator should repeat back to the witness the language recorded by the officer in the answer to Question 17, and confirm that the witness agrees with that characterization of his/her level of confidence.
>
> [*Id.* (internal citations omitted).]

In accordance with these instructions, the Worksheet explicitly requires the officer conducting the identification procedure to record or ask the following questions:

> [Question] 5. Indicate method(s) used to record/document the ID procedure (circle one):

(a) electronic recording: video audio
(b) written verbatim account (attach)
(c) contemporaneous detailed summary (attach)
. . .

[Question 17. D]id you ask the witness during the procedure to make a statement concerning his/her level of confidence that the photo he/she selected depicts the perpetrator? Y N
You must document the **exact words and gestures** used by the witness to describe his/her level of confidence:
. . .

[Question] 19. Was there any other dialogue between anyone in attendance during the identification procedure not described in detail in the answers to # 14 and 17? Y N (If yes, provide a verbatim/detailed summary of the dialogue)

[*Id.* (emphasis in original).]

These model questions further demonstrate that the plain language of *R.* 3:11 requires that law enforcement record the dialogue between the witness and the officer.

The foregoing makes pellucidly clear what law enforcement must do by way of contemporaneously recording identification procedures, as a condition for admitting out-of-court identifications. This understandably includes recording the dialogue between the witness and law enforcement--verbatim, since, as this Court said (and the Rule and Attorney General Guidelines confirm), "[r]equiring 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."

Delgado, 188 N.J. at 61. This case presents the question of the remedy when this mandate is disregarded and the rule broken.

C. The Failure of Law Enforcement to Provide an Appropriate Contemporaneous Recording of the Out-of-Court Identification in this Case Rendered the Identification Inadmissible and Requires that the Resulting Conviction Be Reversed.

In accordance with *Delgado*, *Henderson*, *R.* 3:11(b), and the Attorney General's Guidelines, the out-of-court identification in this case should not have been admitted, and the conviction in this case should, accordingly, be reversed. Here, although the photo array was pre-arranged to take place at the Newark Police Department, Tr. (Nov. 7, 2014), at 7:5-9; *Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *5, the Detective failed to create a video recording, audio recording, written verbatim account, or even a contemporaneous detailed summary of the identification procedure. Instead, the Detective recorded only that Roberts was "confident in his choice," as well as logistical details such as the composition, location, and time of the identification procedure. 15a (Photo Display Report, Newark Police Department); *see also Anthony*, 2017 N.J. Super. Unpub. LEXIS 832, at *10 ("Because this is written in the third person, rather than the first person, it is assumed these were not Roberts' words, but the words of Detective Hannibal.").

This narrative was insufficient for the Court to, in the words of *Delgado*, "understand[] the level of confidence or

uncertainty expressed in the making of an identification and whether any suggestiveness, even unconsciously, seeped into the identification process." 188 N.J. at 60. It is, accordingly, insufficient "to ensure that parties, courts, and juries can later assess the reliability of the identification," *Henderson*, 208 N.J. at 252, and as such required that the out-of-court identification be suppressed. *Cf. Smith*, 436 N.J. Super. at 568 (reversing conviction where "[t]he limited comments recorded by police include [the witness]'s identification, but omit what she was told, her response, or a statement of the specific procedures employed to effectuate the show-up"); *State v. Metz*, 2017 N.J. Super. Unpub. LEXIS 2867, at *27, 2017 WL 5494621 (App. Div. Nov. 16, 2017) (reversing conviction where "[t]he State failed to produce any record or summary of what occurred during the first identification . . . .").

In particular, as set forth above, the Rule--based upon *Delgado*--requires that

> A law enforcement officer shall contemporaneously record the identification procedure in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be made, a

> detailed summary of the identification should be prepared.
>
> [*R.* 3:11(b).]

See Delgado, 188 N.J. at 51 ("[G]iven the importance of ensuring the accuracy and integrity of out-of-court identifications, we will exercise our rulemaking authority to require, as a condition to the admissibility of out-of-court identifications, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure."); *see also Henderson*, 208 N.J. at 241 ("In *Delgado*, *supra*, the Court directed that 'law enforcement officers make a written record detailing [all] out-of-court identification procedure[s], including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results.'" (quoting *Delgado*, 188 N.J. at 63)); Photo Array Eyewitness Identification Procedure Worksheet, Eyewitness ID Guidelines, Attorney General Guidelines - Division of Criminal Justice, http://www.njdcj.org/agguide/Eye-ID-Photoarray.pdf ("New Jersey law requires that law enforcement officers must contemporaneously record the identification procedure. This may be done in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a

written record is used, it must include, if feasible, a verbatim account of any exchange between the officer(s) involved in the procedure and the witness.").

In this case, the State has not and cannot argue, on this record, that it was infeasible for the police to adhere to the clearly established recordkeeping requirements for out-of-court identifications. Although neither the Rule, the caselaw nor the Attorney General's Guidelines define the term "feasible," the ordinary meaning of the term, *see, e.g.*, *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) ("We ascribe to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole." (citations omitted)), is "[c]apable of being accomplished or brought about; possible." The American Heritage Dictionary of English Language 667 (3rd ed. 1996); *see also New Jersey Div. of Youth & Family Servs. v. T.I.*, 423 N.J. Super. 127, 134 (App. Div. 2011) (defining "feasible" as "[c]apable of being done, executed or effected; possible of realization[.]") (quoting Webster's New International Dictionary 926 (2d ed. 1939))). And here, the State, as the party claiming an exemption from a generally applicable rule, must show why it was infeasible to create any type of contemporaneous record of the identification procedure. *See, e.g.*, *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("[T]he general rule

of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948))); *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990) (same).

Nor can the State bear that burden here. The identification at issue was pre-planned--the police chose the time and date of the procedure and were able to enlist a "blind" detective to administer the procedure--and was conducted in a Newark Police Department Major Crimes Division interview room, which certainly contained video recording equipment in order to comply with *R.* 3:17, which requires that all custodial interrogations, in connection with certain crimes, be electronically recorded. *See Horvath*, 2015 N.J. Super. Unpub. LEXIS 2707, at *20 ("We presume that the Kenilworth Police Department has access to video recording equipment, if for no other reason than to comply with *Rule* 3:17."). But even if, somehow, it was infeasible to video or audio record the identification procedure, the police could have easily taken contemporaneous notes, and thus provided the "written record" required by the Rule, which was required, again "if feasible," to be a verbatim one. No showing, of course, was made as to why that was not feasible either. Nor, even if it had been

infeasible, did what was provided--the Detective's third person account of Roberts's confidence in the identification--suffice to constitute the "detailed summary of the identification" that is required in the alternative under *R.* 3:11(b) and the Attorney General's Guidelines.

Specifically, the Rule requires that "the record of an out-of-court identification procedure . . . include details of what occurred at the out-of-court identification, including," *inter alia*, "the dialogue between the witness and the officer who administered the procedure;" "a witness' statement of confidence, in the witness' own words, once an identification has been made;" and "the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said." *R.* 3:11(c). Instead, all that was provided was a third-person account of the witness's level of confidence in the identification. This meager showing also violated the Attorney General Guidelines. Photo Array Eyewitness Identification Procedure Worksheet, Eyewitness ID Guidelines, Attorney General Guidelines - Division of Criminal Justice, http://www.njdcj.org/agguide/Eye-ID-Photoarray.pdf (requiring that the officer record the "verbatim account of any exchange between the officer and the witness and

"the **exact words and gestures** used by the witness to describe his/her level of confidence" (emphasis in original)).[4]

The question, then, is the appropriate remedy for this clear violation of the Rules and the applicable Attorney General

[4] Additional questions that are part of the Attorney General's Worksheet, but that were not asked during the identification procedure in this case, include:

- Did you explain the basic photo array procedures to the witness?
- Did the witness ask any questions about the procedure?
- Did you confirm that the witness understands the procedure before showing him/her any photos?
- Did you ask the witness whether he/she had previously spoken to anyone (law enforcement or civilian) about the identification? Y N (If witness answers yes, provide the identities of those individuals, and a detailed summary of what was said)
- Officers must avoid providing "feedback;" that is, signaling to the witness in any way (whether during or after the identification procedure) that the witness correctly identified the suspect. Did you or anyone else present say or do anything during or after the procedure that would have suggested to the witness that he/she correctly identified the suspect?
- Did the witness look at all of the photos?
- Was this worksheet completed during/immediately following the identification procedure?

Photo Array Eyewitness Identification Procedure Worksheet, Eyewitness ID Guidelines, Attorney General Guidelines - Division of Criminal Justice, http://www.njdcj.org/agguide/Eye-ID-Photoarray.pdf. *See Henderson*, 208 N.J. at 292-93 (indicating that a violation of the Attorney General Guidelines are a factor to consider when determining admissibility); *State v. Muntaqim*, No. A-0451-10T3, 2012 WL 33839, at *5 (N.J. Super. Ct. App. Div. Jan. 9, 2012) (considering a violation of the Attorney General Guidelines when determining whether the identification should be admissible); *see also Newsome v. City of Newark*, No. CV 13-6234, 2017 WL 3784037, at *13 (D.N.J. Aug. 31, 2017) ("The Court agrees, however, that [the detective]'s disregard of the Guidelines supports an inference that the identification was suggestive.").

Guidelines. As discussed above, the language of the Rule is clear: "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," and "[w]henever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness," *R.* 3:11(a)-(b) (emphasis added). This flows directly from the language of *Delgado*, 188 N.J. at 51 ("requir[ing], as a condition to the admissibility of out-of-court identifications, that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure"), and *Henderson*, 208 N.J. at 252 ("Of course, all lineup procedures 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."), as well as from the Committee Report that underlay the Rule, *see* Committee Report at 8-9 (emphasizing that verbatim exchange "must be contained in the written record of an out-of-court identification and that the failure to record [this] factor[] would deem the identification inadmissible").

If and only if the identification procedure was not electronically recorded (which is only permissible if "not feasible") or provided in a verbatim written record (again, only if not feasible), *R.* 3:11(b), then a "detailed summary" may be provided, as described in *R.* 3:11(c). Because the infeasibility of recording the procedure here at issue was not, and could not be established (and because the trial court made no findings as to either), under the plain language of the Rule, and consistent with its legal underpinnings, the out-of-court identification "shall not be admissible." *R.* 3:11(a). Its admission here was, therefore, error and the conviction should be reversed.

Nor is this contrary to *R.* 3:11(d), which states:

> **(d) Remedy.** If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

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." But it is not applicable here, where the State failed to show why it was infeasible to record, or produce a verbatim account of the identification procedure. That is, the question of "details" does not arise unless and

until *R.* 3:11(c) applies--*i.e.*, only if recording, or a verbatim account, is not feasible.

Of course, as set forth above, the account that was provided was woefully lacking, in substance that is far greater than mere "details" or even "important details." That is because here, the Detective failed to record any of her dialogue with Roberts, including Roberts's statement of confidence in his own words. But even if *R.* 3:11(d) is applicable, the trial court even as it acknowledged Anthony's argument, *see* Tr. (Nov. 7, 2014), at 7:25-8:3, failed in any way to consider any of the remedies set forth in the rule--that is, it did not acknowledge its discretion, let alone exercise it. Where that is the case, reversal is required. *See Hite v. Dell*, 78 N.J.L. 239, 241 (Sup. Ct. 1909) (holding that because the justice "did not exercise his discretion . . . the order under review must be reversed"); *Alk Assocs., Inc. v. Multimodal Applied Sys., Inc.*, 276 N.J. Super. 310, 315 (App. Div. 1994) ("No deference need be accorded the actions of the trial court where there is a failure to exercise discretion because the court did not realize it has such discretion, or where the exercise of discretion is mistaken or arbitrary."); *see also In re Grand Jury Investigation*, 545 F.3d 21, 25 (1st Cir. 2008) ("[A] trial court can abuse its discretion by failing to exercise that discretion."); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (noting that failing

to exercise discretion is an abuse of discretion (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978))).

* * *

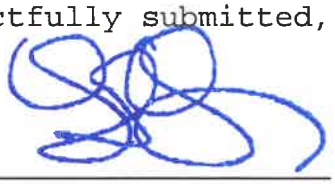
In light of the foregoing, *Amicus* the ACLU of New Jersey respectfully submits that this Court should make clear, to the extent that it is not already, that out-of-court identifications are inadmissible if law enforcement fails to make an appropriate contemporaneous record of the procedure utilized, including the exchange between the officer and the witness and, in particular, the witness's verbatim expression of confidence in his identification. This rule, which is now codified in *R.* 3:11, imposes, as this Court has said, only "a small burden" on law enforcement, but is necessary to protect against juror misconceptions, ensure that only reliable eyewitness identifications are presented at trial, and preserve defendants' constitutional right to a fair trial. *See 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."). The failure to provide that record here deprived the trial court, as well as the Appellate Division and this Court, of the record necessary for it to properly determine the admissibility of the identification and thus to perform the critical gatekeeping function demanded of

the courts with regard to this uniquely critical evidence. Accordingly, the out-of-court identification should not have been admitted, but because it was, the conviction must be reversed.

CONCLUSION

For the reasons set forth above, this Court should hold the out-of-court identification inadmissible and reverse the conviction below.

Respectfully submitted,



Lawrence S. Lustberg (023131983)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

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