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

Approved by Supreme Court Committee on Criminal Practice
February 2, 2012

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I. OVERVIEW

In State v. Henderson, 208 N.J. 208 (2011) and the companion case State v. Chen, 207 N.J. 404 (2011), the Supreme Court revised the standard for assessing the admissibility of eyewitness identification evidence involving police conduct and private actors. The Henderson Court asked the Criminal Practice Committee and the Model Criminal Jury Charge Committee to draft proposed revisions to the current model charges on eyewitness identification. In calling for this revision, the Court charged the Committees with considering "all of the system and estimator variables in section VI for which we have found scientific support that is generally accepted by experts…" See Henderson, supra, 208 N.J. at 298-99. In State v. Delgado, 188 N.J. 48, 63-64 (2006) the Court exercised its rulemaking authority "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." The Delgado Court stated: "[w]e refer to the Criminal Practice Committee for our consideration the preparation of a rule requiring that law enforcement officials record out-of-court identification procedures consistent with this opinion." State v. Delgado, supra, 188 N.J. at 68. In Henderson, the Court stated: "[o]f 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." State v. Henderson, slip op. at 57. In the Henderson opinion, the Court referenced Delgado and discussed other factors with respect to out-of-court identification procedures. See State v. Henderson, supra, 208 N.J. at 252, 254-55, 270-71.

This report contains the Criminal Practice Committee's proposal for the creation of a court rule to address recording requirements for out-of-court identification procedures and revisions to the identification model jury charges. Section II of this report sets forth the Committee's discussion and recommendations for a court rule governing the requirements for an out-of-court identification procedure conducted by law enforcement. This section also includes a summary of the relevant case law, the Committee's discussion, and the Committee's proposed rule amendments. Section III of this report includes the Committee's decision with respect to the identification model jury charges. Section IV of this report includes a discussion of the dissents, alternative language and comments that have been filed.

II. COURT RULE – RECORDING REQUIREMENTS FOR AN OUT-OF-COURT EYE WITNESSIDENTIFICATION PROCEDURE

Upon the direction of the Supreme Court in State v. Delgado, 188 N.J. 48 (2006) and discussions about Delgado in State v. Henderson, 208 N.J. 208 (2011), the Criminal Practice Committee is recommending that the Court adopt a proposed rule addressing recording requirements for out-of-court eye witness identification procedures conducted by law enforcement. The proposed rule amendments were approved by the Committee by a vote of 16-8, with 16 members being in favor of the rule proposals and 8 members being opposed to the proposed rules. Dissenting views and alternate rule proposals have been filed by the Office of the Public Defender (Attachment B) and the New Jersey State Bar Association (Attachment C). A comment in support of the proposed rule has been filed by the Office of the Attorney General (Attachment D). In drafting the proposed rule addressing identification procedures, the Criminal Practice Committee's discussions centered on three major areas: (1) what information or factors

should be included in the identification procedure for an out-of-court eyewitness identification conducted by law enforcement; (2) whether the recordation of the factors is mandatory or discretionary; and (3) whether there is a sanction, such as suppression, redaction and/or jury charges, if any of the factors that are set forth in the rule are not recorded as part of the identification procedure.

A. Case Law

1. State v. Delgado and State v. Earle

In State v. Delgado, 188 N.J. 48, 63-64 (2006) the Court exercised its rulemaking authority, under the New Jersey Constitution "to require, 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." The Delgado Court stated: "[w]e refer to the Criminal Practice Committee for our consideration the preparation of a rule requiring that law enforcement officials record out-of-court identification procedures consistent with this opinion." State v. Delgado, 188 N.J. at 68.

In further discussing identification procedures throughout the opinion, the Delgado Court stated: "[p]reserving 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." Id. at 63. Additionally, the Delgado Court quoted the following language in State v. Earle, 60 N.J. 550, 552 (1972):

> enforcement authorities should nonetheless make a complete record of an identification procedure if it is feasible to do so, to the end that the event may be reconstructed in the testimony. The identity of persons participating in a

> lineup should be recorded, and a picture should be taken if it can be. If the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited. We do not say a failure hereafter to follow such procedures will itself invalidate an identification, but such an omission, if not explained, should be weighed in deciding upon the probative value of the identification, out-of-court and in-court.
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> [State v. Delgado, 188 N.J. at 59 (quoting State v. Earle, 60 N.J. 550, 552 (1972))].

2. State v. Henderson

In State v. Henderson, the Court stated: "[o]f course, all lineup procedures must be recorded and preserved in accordance with the holding in State v. Delgado, 188 N.J. at 63 to ensure that parties, courts, and juries can later assess the reliability of the identification." State v. Henderson, 208 N.J. at 252.

With respect to confirmatory feedback, the Henderson Court stated:

> Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record -- written or otherwise -- of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.
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> We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. To be sure, concerns about feedback are not limited to law enforcement officers. As discussed below, confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence.
> [State v. Henderson, 208 N.J. at 254-55 (citing State v. Delgado, 188 N.J. at 63)].

Additionally, in Henderson, the Court provided:

> To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police

> officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants. We again rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps.
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> [State v. Henderson, 208 N.J. at 270-71 (citing State v. Delgado, 188 N.J. at 63).]

B. Proposed Rule – Discussions

A subcommittee was formed to explore this issue and to recommend a rule proposal for the full Committee to review. The subcommittee looked to the language in Delgado, Henderson and Earle (as cited in Delgado) for guidance on the requirements for out-of-court identification procedures. The original rule proposal included language addressing the following: (1) admissibility of an out-of-court identification; (2) contents of an out-of-court identification; (3) the method of recording an out-of-court identification; and (4) discovery of an out-of-court identification. From the Committee's discussions, the most controversial section of the proposed rule involved the language identifying the contents of an out-of-court identification.

1. Paragraph (a) - Admissibility

The subcommittee proposed that the rule provide that an out-of-court identification resulting from a photographic or live lineup identification procedure conducted by a law enforcement officer would not be admissible, unless a written or, if available, electronic record of the procedure was made. The subcommittee discussed whether the proposed rule should address identification procedures for both law enforcement and private actors or only identification procedures for law enforcement. While there was initially some disagreement, the subcommittee ultimately agreed that

per Delgado and Henderson, the rule should clearly indicate that it was limited to identification procedures involving law enforcement. The subcommittee concluded that the proposed rule should not govern conduct by private actors, as discussed in State v. Chen, 207 N.J. 404 (2011). The subcommittee also agreed that the rule should encompass a written, and if available, an electronic record of the identification procedure. The full Committee agreed.

The proposed language in paragraph (a) of the rule addressing admissibility is limited to identification procedures involving law enforcement. Thus, it does not govern conduct by private actors, as discussed in Chen. The Committee also reviewed the United States Supreme Court decision in Perry v. New Hampshire, 565 U.S. ___ (2012), which was decided on January 11, 2012. In Perry, the United States Supreme Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Perry v. New Hampshire, 565 U.S. at ___ (slip op. at 19). The Committee was in agreement that Perry v. New Hampshire, did not impact upon the proposed court rule because Henderson was decided on independent state grounds, see State v. Henderson, 208 N.J. at 287 n.10, and because the proposed rule does not govern identifications made by private actors without police involvement.

The language approved by Committee addressing the admissibility of an out-of-court identification is contained in paragraph (a) of the proposed identification rule, which states:

> (a) Admissibility. An out-of-court identification resulting from a photographic or live lineup identification procedure

conducted by a law enforcement officer shall not be admissible unless a written or, if available, an electronic record of the identification procedure is made.

2. Paragraphs (b) and (c) - Contents of the Record of an Out-Of-Court Eye Witness Identification Procedure

There was strong disagreement among the Committee members on the Court's intent in Delgado and Henderson with respect to the requirements for the contents of the record of an out-of-court identification procedure. With respect to the contents of an out-of-court identification, the subcommittee's rule proposal provided that to be admissible, the record of an out-of-court identification procedure must include the following specific details:

1. the place where the procedure was conducted;
2. the dialogue between the witness and the officer who administered the procedure;
3. if a live lineup, the identification of the persons present at and participating in the lineup and a picture of the live lineup, which should be taken if it can be;
4. if a photo lineup, the photographic array used and identification of the persons whose photographs were included in the lineup;
5. a witness' statement of confidence, in the witness' own words, once an identification has been made;
6. whether the witness has spoken to anyone about the identification, and if so, to whom and what was said; and
7. the results of the identification procedure, including identifications made or attempted to be made by the witness.

The Committee engaged in an in-depth discussion about the intent of the Court in Delgado and Henderson with respect to what must be included in the record of an out-of-court identification and what need not be included, or at least should not be mandatory (i.e., the information must be present in the record in order for the identification to be admissible). The Committee's discussions revealed many members were uncertain about the intent of the Court, because the Court used the words "shall"

and “must” in some areas of Delgado and Henderson and the word “should” in other areas of the opinions, when referring to the recording requirements. After a discussion, it was proposed that the rule provide that the “Delgado” factors: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; and (3) the results of the identification procedure, including identifications made or attempted to be made by the witness be mandatory contents of the identification record, and the remaining factors should be addressed in the discovery rule. By a vote of 15-12, the Committee rejected this rule proposal, because of disagreement about whether including factors relating to an identification procedure in the discovery rule would be consistent with Delgado and Henderson.

Based upon this disagreement, a further discussion ensued of whether it was proper under Delgado and Henderson to include factors relating to identification procedures, in the discovery rule, Rule 3:13-3, or if the factors should be in the identification rule. The Committee decided that one rule should govern the factors relating to the record of an identification procedure. However, it distinguished between factors that are mandatory, i.e., those items, which if not recorded would result in suppression, and other factors that are relevant, but not mandatory, i.e., the failure to record these relevant factors would not lead to inadmissibility. Instead, the court would consider the relevant factors in assessing the admissibility of the identification. Thus ,the Committee voted 25-3, to revise the proposed rule to provide that the factors set forth in Delgado, 188 N.J. at 63, must be contained in the record of an out-of-court identification procedure for the identification to be admissible. Those factors were identified as: (1) the place where the procedure was conducted; (2) the dialogue

between the witness and the officer who administered the procedure; and (3) the results of the identification procedure, including identifications made or attempted to be made by the witness. These factors are based on the language in Delgado, where the Court stated:

> "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."

Since the Delgado Court used the specific language, quoted above, the Committee was in agreement that those factors 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.

As part of its vote, the Committee also decided that the other factors, set forth in Henderson, and certain factors from Delgado and Earle need not be contained in a record of an out-of-court identification procedure but must be considered, along with other factors, by the court for purposes of considering admissibility. Those discretionary factors were identified as: (1) if a live lineup, the identification of the persons participating in the lineup and a picture of the live lineup, which should be taken if it can be; (2) if a photo lineup, the photographic array used and identification of the persons whose photographs were included in the lineup; (3) identification of persons who are present at a live lineup or at a photo lineup; (4) a witness' statement of confidence, in the witness' own words, once an identification has been made; and (5) whether the

witness has spoken to anyone about the identification, and if so, to whom and what was said.

Thereafter, the subcommittee met and prepared revisions to the rule based upon the full Committee's decision at the November 16, 2011 meeting. The subcommittee's discussion revealed, however, a continuing disagreement of whether the rule proposal was consistent with Henderson. One member who was opposed to the rule as recommended by the Committee pointed out that, as written, the rule did not address Henderson with respect to witness confidence and whether the witness has spoken to anyone about the identification. He suggested that the subcommittee recommend that some, if not all, of the discretionary factors should be mandatory. He argued that otherwise, the rule was inconsistent with Henderson. He also argued that the rule needed to include what minimally must be prepared as part of an out-of-court identification procedure before it is admissible in court and that the rule as presently drafted did not do that. He believed that, as a result, as presently drafted the rule was confusing and did not provide sufficient guidance to the parties or judges who would be determining the admissibility or suppression of an out-of-court identification. Another subcommittee member who was opposed to the language of the Committee's rule revisions was of the opinion that the original version of the rule was correct, in light of the language in Henderson and Delgado. This member voted not to endorse the proposed language making the factors identified in Henderson discretionary, because it was contrary to this member's reading of Henderson. Subcommittee members in favor of the Committee's proposal cited to the Court's use of differing language "shall" "should" and "must" when discussing various factors.

The subcommittee voted 3-2 to recommend that the Committee consider the following language for the identification rule, which essentially incorporated the Committee's decision at the November 16, 2011 meeting, with some stylistic changes.

> (a) Admissibility. An out-of-court identification resulting from a photographic or live lineup identification procedure conducted by a law enforcement officer shall not be admissible unless a written or, if available, an electronic record of the identification procedure is made.
>
> (b) Contents. The record of an out-of-court identification procedure shall include the details of what occurred at the out-of court identification, including: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; and (3) the results of the identification procedure, including identifications made or attempted to be made by the witness.
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> (c) Relevant factors. In considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: (1) if a live lineup, the identification of the persons participating in the lineup and a picture of the live lineup, which should be taken if it can be; (2) if a photo lineup, the photographic array, mug books or digital photographs used and identification of the persons whose photographs were included in the lineup; (3) identifications of persons who are present at a live lineup or at a photo lineup; (4) a witness' statement of confidence, in the witness' own words, once an identification has been made; (5) if the witness has spoken to anyone about the identification to whom and what was said; and (6) when feasible, a written verbatim account of any exchange between the law enforcement officer and witness.
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> (d) Method of recording. When feasible, a law enforcement officer shall contemporaneously record the identification procedure in writing, or electronically, if available. When a contemporaneous recording is not feasible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay.

The subcommittee members who were opposed to the language in the identification rule filed comments and alternative proposed language for the Committee's consideration.

At the January 18, 2011 meeting, the full Committee considered the subcommittee's revisions to the identification rule and the discovery rule. The Committee also considered an alternative rule proposal and comments filed on behalf of the Office of the Public Defender; an alternative proposed language and comments filed on behalf of New Jersey State Bar Association; the model jury charges on identification; and a letter filed on behalf of the Office of the Attorney General. After consideration of the comments and alternative proposals, the Committee ultimately voted 16-8 to adopt the subcommittee's revisions to the identification rule and the discovery rule.

The rule proposal approved by the majority of the Committee is set forth in Appendix A. The dissent to the proposed rule and alternate language that was filed on behalf of the Office of the Public Defender is set forth in Appendix B. The dissent to the proposed rule and alternate language that was filed on behalf of the New Jersey State Bar Association is set forth in Appendix C. The letter that was filed on behalf of the Office of the Attorney General is set forth in Appendix D.

Set forth below is a summary of the discussions of the subcommittee and full Committee about the language describing the contents of the record of an out-of-court identification in the proposed identification rule.

(a) The Place Where The Identification Procedure Was Conducted

Delgado requires 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 . . . ." State v. Delgado, 188 N.J. at 63. The Committee agreed, without objection, that 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 place where the procedure was conducted." The Committee's proposed language is set forth in paragraph (b)(1) of the proposed rule.

(b) The Dialogue Between The Witness and The Officer Who Administered The Procedure

In Delgado, the Court provided that: "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." State v. Delgado, 188 N.J. at 51. The Court further stated: "[p]reserving 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." State v. Delgado, 188 N.J. at 63. In the referral to the Criminal Practice Committee the Delgado Court required 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 dialogue between the witness and the interlocutor." State v. Delgado, 188 N.J. at 63.

The 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.” The Committee's proposed language is set forth in paragraph (b)(2) of the proposed rule.

(c) Witness’ Signature for Accuracy

The subcommittee considered, but did not reach a consensus on whether the rule should include language requiring that the witness sign and date the identification record after a review for accuracy. Those supporting doing so argued that in Delgado, the Court pointed out that "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." State v. Delgado, 188 N.J. at 60.

The subcommittee discussed that the proposed language is designed to address the Court’s concerns about safeguarding evidence and enhancing the reliability of the truth-seeking function at trial. It was explained that in order to ensure the reliability of the written record of the out-of-court procedure both participants (witness and officer) should review the same as to accuracy. For example, it was suggested that, as to level of confidence, the identification record should capture exactly what was said. It was queried, what if the witness says “pretty sure” and the officer mistakenly hears and writes “very sure” in his report. This dialogue is critical under Delgado, yet the report would be recorded incorrectly, unless the witness could first review it for accuracy. It was further argued that the language “signed and dated by the witness” contained in the

proposal is from section II (E) of the "Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures" (April 18, 2001).

Some members were of the view that a witness should not be required to review and sign an identification report for accuracy, because it is not required by either Henderson or Delgado. It was questioned what would happen if law enforcement did not have the identification record immediately available for the witness to sign. The subcommittee discussed whether this proposed language should be in a court rule governing procedure or if it involves substantive law enforcement practice. The full Committee did not adopt this recommendation because it is not required by Henderson or Delgado. Therefore, this language is not included in the proposed court rule.

(d) Live Lineups

Citing State v. Earle, the Delgado Court stated that law "enforcement authorities should nonetheless make a complete record of an identification procedure if it is feasible to do so, to the end that the event may be reconstructed in the testimony. The identity of persons participating in a lineup should be recorded, and a picture should be taken if it can be." State v. Delgado, 188 N.J. at 59 (quoting State v. Earle, 60 N.J. 550, 552 (1972) (emphasis added)). The subcommittee proposed a rule that would have provided 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: . . . (3) if a live lineup, the identification of the persons present at and participating in the lineup and a picture of the live lineup, which should be taken if it can be."

The Committee disagreed with the subcommittee's proposal that this factor, discussing live lineups, must be included in the record of the identification procedure,

and that if it is not recorded, the identification would be suppressed. Rather, the Committee decided that this factor need not be contained in a record of an out-of-court identification procedure but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the identification. Specifically, the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: (1) if a live lineup, the identification of the persons participating in the lineup and a picture of the live lineup, which should be taken if it can be."

The approved language is set forth in paragraph (c)(1) of the proposed rule.

(e) Memorializing Names of Individuals Who are "Present At" the Live Lineup or Photo Array

The subcommittee originally reached a consensus that the rule should require that law enforcement identify persons who are present at a live lineup or photo line up, however, law enforcement would have the option to seek a protective order, see R. 3:13-3(f), if necessary. It was agreed that law enforcement should be able to seek a protective order if concerns arise with respect to possible witness intimidation if the defendant is provided with the names of family members or other individuals who are present at a lineup or if a protective order is otherwise needed for confidentiality purposes. The Committee considered this proposal.

In support of requiring that law enforcement identify persons who are present at a live lineup, the Committee discussed that doing so would codify the intent of Delgado and Henderson with respect to witness confidence, including whether the witness has spoken to anyone about the identification, and if so, to whom and what was discussed.

See State v. Henderson, 208 N.J. at 254-55, 270-71. It was expressed that in Henderson, the Court stated that "confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence." State v. Henderson, 208 N.J. at 254-55. Additionally, it was argued that memorializing the names of individuals who are present at the live lineup was consistent with the ruling in Chen regarding suggestiveness of private actors. Some members argued that in order for a defendant to be granted a Wade hearing involving an identification by a private actor, the defense must be able to explore who was present when an identification is made and whether there was any influence or suggestiveness involved. Moreover, it was stated that providing the names of individuals who are present at a lineup ensures that the complete record of what occurred is preserved.

In opposition, it was discussed that law enforcement should not be required to provide the names of individuals who are present at a live lineup because: (1) neither Delgado nor Henderson explicitly require that law enforcement provide this information as part of an identification procedure, and (2) concerns with possible witness intimidation if the defendant is provided with the names of family members or other individuals who are present at a lineup.

After some discussion, the Committee concluded that there should be a separate subsection of the rule addressing "the identification of persons who are present at a live lineup or a photo lineup." The Committee decided that this factor need not be contained in a record of an out-of-court identification procedure, but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the

identification. Specifically, the majority of the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: . . . (3) identifications of persons who are present at a live lineup or at a photo lineup."

This approved language is set forth in paragraph (c)(3) of the proposed rule. The Committee also reached a consensus that the identification rule need not refer to the prosecutor's ability to get a protective order or to cross-reference Rule 3:13-3(f), but that the Committee's views on protective orders should be discussed in the commentary to the rule.

(f) Picture of Live Lineup

The Delgado Court quoted the following language in State v. Earle, 60 N.J. 550, 552 (1972):

> enforcement authorities should nonetheless make a complete record of an identification procedure if it is feasible to do so, to the end that the event may be reconstructed in the testimony. The identity of persons participating in a lineup should be recorded, and a picture should be taken if it can be. If the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited. We do not say a failure hereafter to follow such procedures will itself invalidate an identification, but such an omission, if not explained, should be weighed in deciding upon the probative value of the identification, out-of-court and in-court.
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> [State v. Delgado, 188 N.J. at 59 (quoting State v. Earle, 60 N.J. 550, 552 (1972) (emphasis added)].

The subcommittee agreed that with respect to any obligation for law enforcement to take a picture of a live lineup, the language should track Delgado. In its discussions,

the subcommittee recognized that neither Henderson nor Delgado require that a photograph of a live lineup be taken in all cases. Delgado explains that "[t]he identity of persons participating in a lineup should be recorded, and a picture should be taken if it can be." State v. Delgado, 188 N.J. at 59 (quoting State v. Earle, 6-0 N.J. 550, 552 (1972)).

Those members in favor requiring that a picture be taken of live lineups explained that with modern technology, it is not onerous or burdensome for a photograph to be taken of live lineups. It was also suggested that requiring pictures to be taken of lineups codifies the intent of Delgado and Henderson with respect to lineup construction and multiple viewings. Addressing lineup construction, the Henderson Court stated that "a suspect should be included in a lineup comprised of look-alikes; A minimum of five fillers should be used, and that lineups should not feature more than one suspect." State v. Henderson, 208 N.J. at 252. The Court explained that all lineup procedures must be recorded and preserved in accordance with Delgado, to ensure that parties, courts and juries can later assess the reliability of the identification. State v. Henderson, 208 N.J. at 252. Regarding multiple viewings, Henderson referred to the risk of "mugshot exposure" and "mugshot commitment". The Court stated that both "mugshot exposure" and "mugshot commitment" can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result, the Court stated that law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once. State v. Henderson, 208 N.J. at 256. Some subcommittee members were of the view that the court rule should codify these variables identified in Henderson, because they directly relate to identification

procedures. On the other hand, some members argued that these factors were discussed in Henderson in the context of substantive pretrial admissibility determinations and jury charge instructions. It was questioned whether the variables discussed in Henderson, should be codified in a court rule addressing law enforcement identification procedures and if such language would expand the scope of Henderson and Delgado and cover substantive law, as opposed to procedure, with respect to out-of-court identifications. The subcommittee agreed that the rule should include the following language: "[t]he record of an out-of-court identification procedure shall include the details of what occurred at the out-of-court identification, including: . . . (3) if a live lineup, the identification of the persons present at and participating in the lineup and a picture of the live lineup, which should be taken if it can be."

The Committee did not object to this factor being in the identification rule. However, a majority of the Committee disagreed with the subcommittee's proposal that this factor, addressing the picture of a live lineup, must be included in the record of the identification procedure, and that if it is not recorded, the identification would be suppressed. Rather, a majority of the Committee decided that this factor need not be contained in a record of an out-of-court identification procedure but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the identification. Specifically, the majority of the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: (1) if a live lineup, the identification of the persons participating in

> the lineup and a picture of the live lineup, which should be taken if it can be."

This approved language is set forth in subsection (c)(1) of the proposed rule.

(g) Photo Array - Identification Of The Persons In The Photographic Array

In Delgado, the Court stated that "[i]f the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited." State v. Delgado, 188 N.J. at 59 (quoting State v. Earle, 60 N.J. 550, 552 (1972) (emphasis added)). The Court further explained: "[i]n our view, it would make little sense to preserve the array of an 'attempted' identification, if a report also did not reflect the 'complete record' of that identification procedure." State v. Delgado, 188 N.J. at 59. The subcommittee discussed whether 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: . . if a photo lineup, the photographic array used and identification of the persons whose photographs were included in the lineup." The subcommittee was unable to reach a consensus on whether the "identification of the persons" whose photographs were included in the photo array should be included in the court rule.

Members who did not support a requirement that law enforcement provide the "identification of the persons" in the photo array stated that the case law did not explicitly require the provision of this information as part of law enforcement identification procedures. Therefore, the "the identification of the persons" in the photographic array language goes beyond what is required by Henderson and Delgado. In support of including the language in the court rule, it was asserted that the

requirement of identifying the names of the persons in the array comes from the Earle opinion and seemingly was cited with approval in Delgado. It was asserted that the identity of the array participants is part of the "complete record" mentioned in Delgado and thus should be preserved for defense review. An example would be where the witness himself is an inmate, and thus the fairness of the lineup would depend on his prior knowledge of the incarcerated status of the lineup participants. It was expressed that at the time of the identification, it is uncertain why the names of the participants might become important, but preserving the complete record safeguards all potentially relevant evidence.

The Committee agreed that this factor involving photo lineups must include references to photo arrays, mug books and digital photographs, as it must cover the various technology used for photo lineups. The Committee also agreed that the factor addressing photo lineups should reference the identity of the persons whose photographs were included in the lineup. The Committee disagreed, however, with the subcommittee's proposal that this factor be mandatory, and that if it is not recorded, the identification would be suppressed because the Committee did not read Delgado as requiring it. Rather, a majority of the Committee decided that this factor need not be contained in a record of an out-of-court identification procedure but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the identification. Specifically, the majority of the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: . . .

> (2) if a photo lineup, the photographic array, mug books or digital photographs used and identification of the persons whose photographs were included in the lineup."

The approved language is set forth in subsection (c)(2) of the proposed rule.

(h) "Show ups" and "Mug Books"

The subcommittee discussed whether its proposed rule, which made all of the content factors mandatory, would govern all identification procedures or if an exception needed to be made for identifications made at show ups or using mug books. Because of the unique circumstances surrounding "show ups" and "mug books" as compared to traditional line ups and photo arrays, the subcommittee discussed whether there should be a "good cause" exception to the content requirements of the rule to ensure that a sufficiently reliable out-of-court identification is not deemed inadmissible for noncompliance with the rule. For example, the subcommittee queried whether a "show up" identification should be excluded from evidence for noncompliance with the rule, because a picture was not taken of the show up or because a picture was taken and then it was lost or misplaced. It was suggested that under certain circumstances, the prosecutor should be able to explain missing items and the judge should have discretion, guided by a good cause or other appropriate standard, to admit evidence that would otherwise not meet the mandatory requirements set forth in the proposed rule.

The Committee discussed whether the rule addresses, or should address, identification procedures for show ups. One member suggested that the identification procedures discussed in Delgado do not apply to show ups. It was then queried whether Henderson, extended Delgado to address show ups. It was proposed that the

rule should not address show ups, because Henderson did not expressly say that it should. Other members expressed the view that the rule should cover show ups. Some members queried that if Henderson did not require a written record of show ups, whether the Committee should consider developing a procedure with respect to that category of identifications, or if that should be left to case law. The Committee decided that the factors relating to photo arrays and live lineups are not required to be in the identification record under Henderson and Delgado. Rather, those factors must be considered by the court in determining admissibility of the identification. The Committee included "mug books" in the subsection of the rule addressing photo lineups, see paragraph (c)(2) of the proposed rule. The Committee did not develop specific language in the identification rule addressing show ups.

(i) Witness' Statement Of Confidence

In Henderson, the Court addressed concerns with confirmatory feedback and stated:

> Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record -- written or otherwise -- of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided. We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. To be sure, concerns about feedback are not limited to law enforcement officers. As discussed below, confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence.
>
> [State v. Henderson, 208 N.J. at 254 (citing State v. Delgado, 188 N.J. at 63) (emphasis added)].

The subcommittee recommended that the rule 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: . . . a witness' statement of confidence, in the witness' own words, once an identification has been made."

The Committee disagreed with the subcommittee's proposal that this factor addressing a witness' statement of confidence must be included in the record of the identification procedure, and that if it is not recorded, the identification would be suppressed. Rather, the Committee decided that this factor from Henderson need not be contained in a record of an out-of-court identification procedure but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the identification. Specifically, the majority of the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: . . . a witness' statement of confidence, in the witness' own words, once an identification has been made."

The approved language is set forth in subsection (c)(4) of the proposed rule.

(j) Identifying to Whom The Witness Has Spoken To And What Was Said

In Henderson, the Court provided that:

> "[t]o uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants. We again rely on our

> supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps."
>
> [State v. Henderson, 208 N.J. at 270-71 (citing State v. Delgado, 188 N.J. at 63) (emphasis added)].

The subcommittee agreed that the proposed 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: . . . (6) whether the witness has spoken to anyone about the identification, and if so, to whom and what was said."

The Committee disagreed with the subcommittee's proposal that this factor addressing to whom the witness has spoken and what was said, must be included in the record of the identification procedure and that if it is not recorded, the identification would be suppressed because the Committee did read Henderson and Delgado as requiring it. Rather, the Committee decided that this factor from Henderson, need not be contained in a record of an out-of-court identification procedure but it must be considered, along with other factors, by the court for purposes of considering the admissibility of the identification. Specifically, the majority of the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: . . if the witness has spoken to anyone about the identification to whom and what was said."

The approved language is set forth in subsection (c)(5) of the proposed rule.

(k) Verbatim Account

In Delgado, the Court stated: "[w]hen 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." State v. Delgado, 188 N.J. at 63-64 (emphasis added). Footnote 9 of Delgado provides: "[t]he making of a contemporaneous record is the preferred method. We suggest that law enforcement officers not delay in recording or summarizing the out-of-court identification procedures." State v. Delgado, 188 N.J. at 63-64 and n.9.

The subcommittee had originally proposed that the rule contain a separate paragraph addressing the method of recording, which would have provided:

> When feasible, the officer shall contemporaneously record the identification procedure in writing, or electronically, if available. When a contemporaneous recording is not feasible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay. The recorded identification procedure shall include a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and witness. When a verbatim account is not feasible, a detailed summary of the identification should be prepared.

Upon further review, the subcommittee recommended and the Committee agreed that in light of Delgado the language "when feasible, a written verbatim account of any exchange between the law enforcement officer and witness" should be included in the subsection of the proposed rule addressing relevant factors for the court to consider for purposes of admissibility, as opposed to being included in the paragraph addressing the method of recording. Specifically, the Committee decided that the rule should provide that:

> "[i]n considering the admissibility of an out-of-court identification, the court shall take into consideration, among

> other factors, whether the identification record includes and the substance of the information recorded pertaining to: . . . when feasible, a written verbatim account of any exchange between the law enforcement officer and witness."

The approved language is set forth in subsection (c)(6) of the proposed rule.

(l) Identifications Made and Attempted To Be Made

In Delgado, the Court required 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 results." State v. Delgado, 188 N.J. at 63. The Delgado Court further explained the duty for law enforcement to "record the details of out-of-court identification procedures that result in positive identifications and non-identifications as well as near misses and hits." State v. Delgado, 188 N.J. at 58. It stated:

> The Court in Earle intended that when "the identification is made or attempted on the basis of photographs," the array should be preserved. In our view, it would make little sense to preserve the array of an "attempted" identification, if a report also did not reflect the "complete record" of that identification procedure. Without a report provided to him in discovery, a defendant likely would have no way of knowing about the attempted identification. When an "identification is made," the result is no less important if the witness selects a person other than the defendant, for such information could give rise to the defense that someone else committed the crime.
>
> [State v. Delgado, 188 N.J. at 59 (citing State v. Earle, 60 N.J. at 552)].

The Committee agreed that 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 results of the identification procedure, including

identifications made or attempted to be made by the witness." This language is set forth in paragraph (b)(3) of the proposed rule.

3. Paragraph (d) - Method of Recording an Out-of-Court Identification

Addressing the method of preparing a record of an out-of-court identification, in Delgado, the Court stated: "[w]hen 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." State v. Delgado, 188 N.J. at 63-64 (emphasis added). Footnote 9 of Delgado provides: "[t]he making of a contemporaneous record is the preferred method. We suggest that law enforcement officers not delay in recording or summarizing the out-of-court identification procedures." State v. Delgado, 188 N.J. at 63-64 and n.9. The subcommittee originally proposed that the rule would require recordation either contemporaneously or as soon as possible thereafter.

The Committee decided that in light of Delgado, the language "when feasible, a written verbatim account of any exchange between the law enforcement officer and witness" should be included in the subsection of the proposed rule addressing relevant factors for the court to consider for purposes of admissibility, as opposed to being included in the paragraph addressing the method of recording. The Committee decided that the following language should address the method of recording out-of-court identifications:

> Method of recording. When feasible, a law enforcement officer shall contemporaneously record the identification procedure in writing, or electronically, if available. When a

> contemporaneous recording is not feasible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay.

This language is set forth in paragraph (d) of the proposed rule.

4. Discovery of Out-Of-Court Identification Records– Proposed Revisions to Rule 3:13-3

In Delgado, the Court stated that "[d]efendants will be entitled in discovery to any reports or tape recorded statements covering an identification procedure." State v. Delgado, 188 N.J. at 64. The subcommittee proposed that the identification rule should include a provision addressing discovery, however, the subcommittee was unable to reach a consensus on the language. Specifically, the subcommittee was divided on whether discovery paragraph of the rule should: (1) require that the identification records automatically be provided to the defendant as part of discovery, as opposed to the defendant having to make a request for it, or (2) provide that the identification records be made available to the defendant as part of discovery. The subcommittee asked the Committee to consider different versions of the rule proposal to address discovery. The subcommittee also asked that the Committee consider if the rule should reference that the "notes" relating to the identification should be provided as part of discovery. See State v. W.B., 205 N.J. 588 (2011).

The suggested language requiring that the identification records automatically be provided as part of discovery was designed to avoid the need to request an adjournment when defense counsel has not received information relating to the out-of-court identification in discovery. However, it was suggested that the discovery of identification records should not be treated differently than the current rule's requirements governing pre and post-indictment discovery procedures. It was opined

that language providing that the records related to an identification procedure be made available to the defendant, would be consistent with the current language of R. 3:13-3. Therefore, if the identification records are not provided by the state, the defendant will have to make a request for it.

The Committee queried whether a paragraph governing discovery is necessary or if the current discovery rules were sufficient. The Committee ultimately agreed that specific language addressing discovery of identification records is desirable. It also agreed that the language addressing discovery should be in Rule 3:13-3, instead of the identification rule. The Committee agreed that Rule 3:13-3 should be amended to add a new paragraph (c)(10), which governs discovery by the defendant to include identification records. The language approved by the Committee states:

> (c) Discovery by the Defendant. The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b): . . .
>
> (10) All records, including notes, reports and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made.

III. MODEL JURY CHARGE – EYEWITNESS IDENTIFICATION

In State v. Henderson, 208 N.J. 208 (2011) the Court asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and to address various system and estimator variables. The Criminal Practice Committee was informed that the Model Jury Charge Committee extensively discussed the revisions to the identification jury charges and reached a unanimous agreement with respect to the language. The Criminal Practice Committee reviewed the comprehensive revisions to

the identification charges that were drafted by the Model Jury Charge Committee and unanimously approved the revisions made by the Model Jury Charge Committee to the identification instructions. The Model Criminal Jury Charge Committee is separately filing proposed revisions to the identification charges in a report to the Court.

A comment was filed by the New Jersey State Bar Association (NJSBA), which states: "[t]he proposed model jury charge fails to address what instruction the jury should be given if law enforcement has failed to record the information which it is supposed to consider in determining if the State has proven the identity of the person who committed the offense beyond a reasonable doubt, such as a negative inference." The NJSBA queried "[w]hat would the jury be instructed if any of the factors or variables contained in the proposed model jury charges were not recorded but are testified to?" The full comment on the proposed rule amendments and the jury charges that was filed on behalf of the NJSBA is set forth in Appendix C of this Report.

IV. DISSENTS AND COMMENTS

A. Dissent Filed By the Office of the Public Defender to the Proposed Identification Rule (Appendix B)

A dissent was filed in opposition to the proposed rule governing identification procedures on behalf of the Office of the Public Defender. The dissent expressed the Public Defender's position that in State v. Henderson the factors addressing a witness' statement of confidence, in the witness' own words, once an identification has been made; and whether the witness has spoken to anyone about the identification, and if so, to whom and what was said, must be mandatory factors in paragraph (b) of the proposed rule, as opposed relevant factors in paragraph (c) of the proposed rule. The

dissent explains the Public Defender's position that when referencing a witness' statement of confidence and whether the witness has spoken to anyone in Henderson, the Court used the terms "must and we direct" and also cited to its supervisory powers "in requiring that practice" and "in requiring those steps." The Public Defender argues that this language used in Henderson is similar to the language in State v. Delgado, which requires that the record of an identification procedure must contain the factors set forth in paragraph (b) of the proposed rule. The Public Defender's dissent expressed that a fair reading of Henderson and Delgado would require that the factors relating to a witness' statement of confidence and whether the witness has spoken to anyone should be among the mandatory factors in paragraph (b) of the proposed rule.

Second, the Office of the Public Defender suggests revisions to paragraph (c) of the rule to add language to the beginning and the end of the rule which is designed to provide guidance to trial courts on how to assess the factors set forth in the rule and also how to handle situations if the factors are not recorded properly. The suggested language in paragraph (c) of the dissent's proposed rule would provide guidance to the court in assessing the factors to preclude sufficiently unreliable identifications from being presented, as stated in Henderson. The Office of the Public Defender recommends that the Court adopt revisions to the identification rule as set forth in its dissent in Appendix B.

B. Dissent Filed By the New Jersey State Bar Association to the Proposed Identification Rule and Comment on the Jury Charges (Appendix C)

A dissent was filed in opposition to the proposed rule on behalf of the New Jersey State Bar Association (NJSBA). The dissent expressed the position of the

NJSBA that State v. Henderson assumes that the factors for the identification procedure are recorded and that the issue to be addressed for purposes of admissibility is what the recording of those factors reveals. The dissent expresses that the language in the Committee's proposed rule does not mandate recording of the factors. To support this position, the dissent references the language in State v. Delgado, which provides that the identification procedure should be recorded and disclosed to the defendant and the language in State v. Henderson, which specifically refers to Delgado with respect to creating a written record of an identification procedure. The NJSBA recommends that the Court adopt the original rule proposed by the subcommittee at the Committee's November 16, 2011 meeting (Appendix C).

With respect to the proposed model jury charges on identification, the NJBSA expressed that there was no instruction drafted to address situations when certain items are not recorded, but may be testified to as part of a proceeding. The Committee was informed that the model jury charge committee recently approved a supplemental charge in light of State v. W.B., 205 N.J. 588 (2011), which could be used when items in the identification procedure are not recorded but are testified to at trial.

C. Letter Comment Filed on Behalf of the Office of the Attorney General in Support of the Proposed Identification Rule (Appendix D)

A letter in support of the proposed rule was submitted on behalf of the Attorney General's Office. The Office of the Attorney General expressed the position that Henderson does not set forth an absolute rule of suppression and therefore, the Court should adopt the version of the rule as recommended by the majority of the Committee.

V. CONCLUSION

In conclusion, the Criminal Practice Committee considered, in-depth, what factors should be included in the record of an out-of-court identification procedure, the method of recording the procedure and the sanction for failure to record the factors. The Committee was divided with respect to the language of the identification rule and is respectfully submitting, for the Court's consideration, the rule proposal as recommended by the majority of the Committee and the dissents and alternative language that have been filed in this matter.

Respectfully Submitted,

Honorable Lawrence Lawson, Chair
Honorable Victor Ashrafi, Vice-Chair
Honorable Christine Allen-Jackson
Honorable Joseph Cassini
Honorable Gerald Council
Honorable Martin Cronin
Honorable Mark Fleming
Honorable Albert Garofolo
Honorable David Ironson
Honorable Edward Jerejian
Honorable Samuel Natal
Honorable Mitchel Ostrer
Honorable Sheila Venable
Richard Barker, Esq.
Prosecutor Robert Bernardi
Prosecutor Robert Bianchi
Hilary Brunell, Esq.
John Cannel, Esq.
Jeffrey Coghlan, Esq.
Philip Degnan, Esq.
Donald DiGioia, Esq.
Mark Eliades, Esq.
Patrice Hayslett, Esq.
Dale Jones, Esq.
James Lynch, Esq.
John McMahon, Esq.
John McNamara, Esq.
Boris Moczula, Esq.
Dennis Murphy, Esq.
Ricardo Solano, Esq.
Ronald Susswein, Esq.
Stephen Taylor, Esq.
Prosecutor David Weaver
Dolores Pegram Wilson, Esq.
Paul Yoon, Esq.

Staff: Melaney S. Payne, Esq.
Joseph J. Barraco, Esq.

APPENDIX A

PROPOSED RULES

APPROVED BY THE COMMITTEE MAJORITY

WRITTEN RECORD OF OUT-OF-COURT IDENTIFICATION PROCEDURES

(a) Admissibility. An out-of-court identification resulting from a photographic or live lineup identification procedure conducted by a law enforcement officer shall not be admissible unless a written or, if available, an electronic record of the identification procedure is made.

(b) Contents. The record of an out-of-court identification procedure shall include the details of what occurred at the out-of-court identification, including: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; and (3) the results of the identification procedure, including identifications made or attempted to be made by the witness.

(c) Relevant factors. In considering the admissibility of an out-of-court identification, the court shall take into consideration, among other factors, whether the identification record includes and the substance of the information recorded pertaining to: (1) if a live lineup, the identification of the persons participating in the lineup and a picture of the live lineup, which should be taken if it can be; (2) if a photo lineup, the photographic array, mug books or digital photographs used and identification of the persons whose photographs were included in the lineup; (3) identifications of persons who are present at a live lineup or at a photo lineup; (4) a witness' statement of confidence, in the witness' own words, once an identification has been made; (5) if the witness has spoken to anyone about the identification to whom and what was said; and (6) when feasible, a written verbatim account of any exchange between the law enforcement officer and witness.

(d) Method of recording. When feasible, a law enforcement officer shall contemporaneously record the identification procedure in writing, or electronically, if available. When a contemporaneous recording is not feasible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay.

Adopted _____to be effective _____.

Rule 3:13-3. Discovery and Inspection.

(a) Pre-Indictment Discovery. . . . no change.

(b) Post Indictment Discovery. . . . no change.

(c) Discovery by the Defendant. The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor;

(4) reports or records of prior convictions of the defendant;

(5) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor;

(6) names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;

(7) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons;

(8) police reports which are within the possession, custody, or control of the prosecutor;

(9) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial[.]; and

(10) All records, including notes, reports and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made.

(d) Discovery by the State. . . . no change.

(e) Documents Not Subject to Discovery. . . . no change.

(f) Protective Orders. . . no change.

(g) Continuing Duty to Disclose; Failure to Comply. . . . no change.

Source-R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective

September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007; subparagraph (f)(1) amended July 21, 2011 to be effective September 1, 2011[]; paragraph (c) amended to be effective..

APPENDIX B

DISSENT TO THE PROPOSED RULE AND ALTERNATE LANGUAGE FILED ON BEHALF OF THE OFFICE OF THE PUBLIC DEFENDER

Chris Christie
Governor

Kim Guadagno
Lt. Governor

Joseph E. Krakora
Public Defender

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Dear Members of the New Jersey Supreme Court:

Below please find an alternative proposed version of the Henderson court rule, offered by The Office of the Public Defender.

(Alternative) PROPOSED HENDERSON COURT RULE

WRITTEN RECORD OF OUT-OF-COURT IDENTIFICATION PROCEDURES

(a) Admissibility. An out-of-court identification resulting from a photographic or live lineup identification procedure conducted by a law enforcement officer shall not be admissible unless a written or, if available, an electronic record of the identification procedure is made.

(b) Contents. The record of an out-of-court identification procedure shall include the details of what occurred at the out-of court identification, including: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; (3) a witness' statement of confidence, in the witness' own words, once an identification has been made; (4) whether the witness has spoken to anyone about the identification, and if so, to whom and what was said; and (5) the results of the identification procedure, including identifications made or attempted to be made by the witness.

(c) Relevant factors. In determining the admissibility of an out-of-court identification, the court shall evaluate whether the identification record has sufficiently preserved the details of what occurred at the out-of-court identification procedure and shall take into consideration, among other factors, whether the identification record includes: (1) if a live lineup, the identification of the persons participating in the lineup and a picture of the live lineup, which should be taken if it can be; (2) if a photo lineup, the photographic array, mug books or digital photographs used and identification of the persons whose photographs were included in the lineup; (3) identifications of persons who are present at a live lineup or at a photo lineup ; and (4) when feasible, a written verbatim account of any exchange between the law enforcement officer and witness. If the identification record is lacking in important details of what occurred at the out-of-court identification procedure, which were feasible to obtain and preserve, the court may, in its sound discretion, declare the identification record inadmissible, or, alternatively, redact portions of the identification testimony, or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

(d) Method of recording. When feasible, a law enforcement officer shall contemporaneously record the identification procedure in writing, or electronically, if available. When a contemporaneous recording is not feasible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay.

Explanation for alternative proposed rule prepared by Office of the Public Defender (OPD):

The first suggested change is to move (c)(4) ("statement of confidence") and (c)(5) ("has the witness spoken to anyone") back to subsection (b) as originally proposed by the sub-committee. OPD believes that the Court required this in Henderson because, at pages 60 (statement of confidence) and 84 (has the witness spoken to anyone) of the Henderson slip opinion, there is strong language such as "must" and "we direct" and, in both instances, the Court cited its supervisory powers "in requiring that practice" (page 60) and "in requiring those steps" (page 84). Also, it should be noted that when the Committee voted to limit subsection (b) to the place where the procedure was conducted, and the dialogue and results, the supportive language cited was from Delgado at p.63 where the Court similarly cited its supervisory powers "to require" that the record must contain the three above areas. Clearly, (c)(4) and (c)(5) should be moved to subsection (b) because the Court has also required the record to contain that information.

The second suggested change is to add new language at the beginning and end of subsection (c), which is offered to clarify the trial court's role as the gatekeeper in precluding "sufficiently unreliable identifications from being presented". Henderson, slip opinion at 133. The rule proposed by the committee offers no real guidance to trial judges in determining admissibility other than to "take into consideration the substance of the information recorded" in the identification record. The OPD alternative offers options to the trial judge and addresses the need for a standard, i.e., "sufficiently preserve the details" of what occurred at the procedure, along with what to do if certain details were not preserved but easily could have been. Since the court's discretion is involved, and suppression is not mandated, the rule complies with the Henderson language that rejected a bright-line rule that would require suppression every time law enforcement missteps. Id, slip opinion at 6. The alternative options proposed by OPD as available to the trial court were suggested by the Henderson court on page 126 ("redact parts of identification testimony") and page 57 (poorly constructed lineup may require jury instruction).

Respectfully submitted,
New Jersey Office of the Public Defender

APPENDIX C

DISSENT TO THE PROPOSED RULE AND ALTERNATE LANGUAGE FILED ON BEHALF OF THE NEW JERSEY STATE BAR ASSOCIATION

Richard D. Barker, Esq.
New Jersey State Bar Association Representative to
The New Jersey Supreme Court Criminal Practice Committee
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December 9, 2011

To: The New Jersey Supreme Court Criminal Practice Committee

Re: (1) The Supreme Court Criminal Practice Committee - proposed rule revisions to the identification rule (originally proposed by the Henderson/Delgado Sub-Committee) as recommend by the Full Committee at it's 11/16/2011 meeting, and
(2) The revisions by the Henderson/Delgado Sub-Committee at its 12/6/2011 conference call

As you are aware I am the New Jersey State Bar Association representative to The New Jersey Supreme Court Criminal Practice Committee and it is in that capacity that I make the following comments concerning the above.

The current draft of the proposed new rule, "Written Record Of Out-Of-Court Identification Procedures," as approved by the subcommittee on December 6, 2011, requires a critical modification in order to be consistent with the Supreme Court's decisions in State v. Henderson, 208 N.J. 208 (2011), State v. Chen, 208 N.J. 307 (2011), and State v. Delgado, 188 N.J. 48 (2006). Specifically, "we" urge the committee to modify the rule to require that the record of an out-of-court identification procedure include the witness' statement of confidence and the witness' explanation of who the witness spoke to about the identification.

Under the current draft of the rule, subsection (b) requires that the following be included in the record of the out-of-court identification: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; and (3) the results of the identification procedure, including identifications made or attempted to be made by the witness. Subsection (b), however, does not require that the witness' statement of confidence or the witness' explanation of who the witness spoke to about the identification and what was said be included in the recording. Rather, these two factors are included under subsection (c), items to be considered in assessing the admissibility of the identification. Both of these factors should be moved to the subsection (a) list of factors that must be included in the record of the out-of-court identification in order for the identification to be admissible.

Indeed, with regard to the first factor, witness' statement of confidence, the Henderson Court specifically held that "law enforcement officers should make a full record -- written or otherwise -- of the witness' statement of confidence once an identification is made." (Henderson, 208 N.J. at 254) **Emphasizing that the recordation of the witness' statement of confidence is mandatory, the Court continued:**

> We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. See Delgado, supra, 188 N.J. at 63 (requiring written record of identification procedure). Henderson, 208 N.J. at 254.

Similarly, the Henderson Court also, again citing to Delgado and relying on its supervisory powers, **mandated that police record whether the witness spoke to anyone about the identification, and if so, what was said.** In this regard, the Court stated:

> …we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. **That information should be recorded and disclosed to defendants. We again rely on our supervisory powers** under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps. See Delgado, supra, 188 N.J. at 63.

Henderson, 208 N.J. at 270-71; see also Chen, 308 N.J. at 322 ("To uncover relevant information about possible feedback from co-witnesses and other sources, **we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit** (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. **That information should be recorded and disclosed to defendants. We again rely on our supervisory powers** under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps. See Delgado, supra, 188 N.J. at 63, 902 A.2d 888.").

As the above quoted language illustrates, the Supreme Court's intent in Henderson and Chen was to expand upon its prior holding in Delgado to require that the record of an out-of-court identification procedure include the witness' statement of confidence and the witness' explanation of who the witness spoke to about the identification. In other words, just as the Court in Delgado relied upon its supervisory powers 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" (Delgado, 88 N.J. at 63), the Court in Henderson and Chen, relying upon those same powers and citing Delgado, requires that the written record of the identification procedure also include the witness' statement of confidence and the witness' explanation of who the witness spoke to about the identification.

The currently proposed rule fails to take into consideration that the only way the factors in proposed section (c) can be considered in determining the admissibility of the identification is if the factors are recorded in the first place. Henderson doesn't say that whether or not these factors are recorded is to be considered in determining the admissibility of the identification. **Rather, Henderson assumes these factors are recorded and says that what the recording reveals about these factors is what is to be considered in determining the admissibility of the identification.**

For example, this proposed version of the rule subsection (c) states that the Court, when determining the admissibility of the identification, "shall take into consideration, among other factors, if the identification record includes a witness' statement of confidence." But, this is not consistent with the plain language of the above cases or the clear intent of the Court. **The Court is not supposed to be weighing whether the confidence statement is recorded in order to determine the admissibility of the identification; the court is supposed to be weighing what the confidence statement actually says in order to determine the admissibility of the identification. You need the recording of the confidence statement as a prerequisite to even considering the admissibility of the identification** so that the court may consider, in making the admissibility determination, what the witness said regarding confidence. You **need the recording of the confidence statement before you can even get to the next step of considering how the confidence statement impacts on admissibility.**

As such, the current draft version of the rule, relegating these two factors to merely "[r]elevant factors" "for considering the admissibility of an out-of-court identification" is in direct contradiction of the Supreme Court's mandate in Henderson and Chen. Additionally, the current proposed rule does not appear to be consistent with the proposed model jury charges on identification. For example, the proposed model jury charge addresses testimony about a witness' statement of confidence, however, the proposed rule does not require that the factors in paragraph (c), such as a witness' statement of confidence, must be (recorded) a part of the identification record. The proposed model jury charge fails to address what instruction the jury should be given if law enforcement has failed to record the information which it is suppose to consider in determining if the State has proven the identity of the person who committed the offense beyond a reasonable doubt, such as a negative inference. See:

State v. W.B., 205 N.J. 588 (2011) - Convictions affirmed. "While we now affirm the Appellate Division and sustain defendant's convictions, we hold that … that an adverse inference charge may be given when a police officer destroys his or her investigatory notes before trial…. Here, Det. Gade conceded on cross-examination that, after she wrote her report, she destroyed notes taken at interviews she conducted with both D.L. and defendant. She explained that she was taught by her superiors not to retain the contemporaneous notes…. Our criminal discovery rules do not currently require the recordation of all statements of witnesses obtained by law enforcement officers. But they do provide for discovery of all statements whether signed or unsigned, of witnesses as well as police reports which are 'in the possession, custody and control of the prosecutor.' See R. 3:13-3(c)(6), (7) and (8). Therefore, we hold today that the Rule encompasses the writings of any police officer under the prosecutor's supervision as the chief law enforcement officer of the county. [Citations omitted]. If a case is referred to the prosecutor following arrest by a police officer as the initial process, or on a complaint by a police officer, see R. 3:3-1; R. 3:4-1, local law enforcement is part of the prosecutor's office for discovery purposes**…. Logically, because an officer's notes may be of aid to the defense, the time has come to join other states that require the imposition of 'an appropriate sanction' whenever an officer's written notes are not preserved…. starting thirty days from today, if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case.** Although our holding regarding the discovery obligation is merely a

reiteration of existing law, because defendant neither requested an adverse inference charge before the final jury instructions were given, nor raised the issue before filing his motion for new trial, we decline to hold he was entitled to such an instruction in this case." (Emphasis added).

What would the jury be instructed if any of the factors or variables contained in the proposed model jury charges were not recorded but are testified to?

"We" respectfully request that the Committee modify the draft version of the rule in accordance with the Court's mandate by requiring that the written record of the identification procedure also include the witness' statement of confidence and the witness' explanation of who the witness spoke to about the identification. In this way there will be continuity between the proposed rule and the proposed model jury charges.

Respectfully submitted,

Richard D. Barker, Esq.
NJSBA Representative to
The NJ Supreme Court Criminal Practice Committee

PROPOSED RULE

WRITTEN RECORD OF OUT-OF-COURT IDENTIFICATION PROCEDURES

(a) Admissibility. An out-of-court identification resulting from a photographic or live lineup identification procedure conducted by a law enforcement officer shall not be admissible unless a written or, if available, an electronic record of the identification procedure is made.

(b) Contents. The record of an out-of-court identification procedure shall include the details of what occurred at the out-of court identification, including: (1) the place where the procedure was conducted; (2) the dialogue between the witness and the officer who administered the procedure; (3) if a live lineup, the identification of the persons present at and participating in the lineup and a picture of the live lineup, which should be taken if it can be; (4) if a photo lineup, the photographic array used and identification of the persons whose photographs were included in the lineup; (5) a witness' statement of confidence, in the witness' own words, once an identification has been made; (6) whether the witness has spoken to anyone about the identification, and if so, to whom and what was said; and (7) the results of the identification procedure, including identifications made or attempted to be made by the witness.

(c) Method of recording. When feasible, the officer shall contemporaneously record the identification procedure in writing, or electronically, if available. The recorded identification procedure shall include a verbatim account of any exchange between the law enforcement officer and witness. When a verbatim account is not feasible, a detailed summary of the identification should be prepared. When a contemporaneous recording is not possible, the officer shall prepare a record of the identification procedures, as soon as practicable and without undue delay.

(d) Discovery. Any notes, records, electronic recordings and written reports relating to an identification procedure, the results of the identification procedure, including identifications made or attempted to be made, shall be provided to defendant in discovery, pursuant to Rule 3:13-3.

APPENDIX D

COMMENT FILED ON BEHALF OF THE OFFICE OF THE ATTORNEY GENERAL

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January 9, 2012

To: Supreme Court Criminal Practice Committee

Re: Proposed Revision to Eyewitness Identification Court Rule

Dear Committee Members:

Please consider this correspondence as the Attorney General's Office's response to the December 9, 2011 submission by Deputy Public Defender Richard Barker, writing in his capacity as the New Jersey State Bar Association's ("NJSBA") representative to the Criminal Practice Committee. The December 9 letter advocates a modification of the proposed court rule concerning eyewitness identification evidence (voted by the Committee at its November 16, 2011 meeting) to require -- as a pre-condition to the admissibility of out-of-court identification evidence -- that police obtain a confidence statement from the witness at the time of the identification procedure, and also obtain a list from the witness of all individuals to whom the witness spoke about the identification. According to the letter, these two factors should be moved to the list of factors that must be included in the record of the out-of-court identification in order for the identification to be admissible. Thus, the December 9 letter advocates a "per se" rule of suppression whenever either of these requirements is not satisfied by police at the time of the identification procedure.

The notion that an eyewitness identification is rendered inadmissible simply because the police failed to obtain a confidence statement from the witness at the time of the identification procedure, or failed to ask the witness about who

else the witness spoke to about the identification, has no support in the Henderson opinion. Indeed, Henderson expressly refutes that idea:

> Finally, in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with Rule 403. For example, if an eyewitness' confidence was not properly recorded soon after an identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial. [State v. Henderson, 208 N.J. 208, 298 (2011) (emphasis supplied)].

The premise of the above language is that the identification would not regularly be suppressed in the circumstances mentioned, and confirms that the confidence statement itself would not be subject to automatic suppression every time the police failed to properly record a confidence statement at the time of the identification procedure. Rather, the Court leaves it to trial judges to engage in the sort of case-by-case, fact-intensive analysis that is part and parcel of a judge's responsibility under N.J.R.E. 403. The above passage cannot logically co-exist with the December 9 letter's interpretation of Henderson.

What the foregoing excerpt also reveals is that the Henderson opinion leaves open the question of what the appropriate remedy may be for a failure to record a confidence statement -- whether it be a jury charge, partial redaction, or whatever else a trial judge deems most appropriate in the circumstances of a particular case. We believe it reflects the Court's determination that the question of an appropriate remedy is better left to litigation, not Rule making. Accordingly, it is not for this Committee to independently fashion a Rule-based remedy for a failure to record a confidence statement, or for a failure to record the list of individuals to whom the witness may have spoken concerning the identification.

While the above excerpt from the Court's opinion is dispositive, the Attorney General's Office adds the following, in the interest of setting forth our position more completely.

First, the December 9 letter's advocacy of a "per se" suppression rule marks a return to the very position the defendant took in Henderson; that is, an automatic suppression remedy every time the police failed to adhere to the Attorney General's Guidelines.[1] Henderson, 208 N.J. at 281. That position was abandoned by the defense once the case reached the Supreme Court. Id. It should not be resurrected, or entertained by the Committee, in the guise of formulation of a Court Rule.

Second, and more fundamentally, the logic of the December 9 letter runs counter to the approach taken in the Henderson opinion in that the police would be penalized even if they do everything right in the sense that they obtain a totally suggestion-free identification -- a process complete with pre-ID instructions to the witness, double blind, sequential, *etc.* Henderson makes clear that, under those facts, the defendant would not even be entitled to a pretrial hearing to challenge the admissibility of the identification, let alone suppression, since there is nothing to support the notion that there was "some evidence" of police-created suggestion. Yet the December 9 letter's view of that very same opinion would require automatic suppression of an identification if the police fail to get a confidence statement at the time of the identification procedure. Or, by the same logic, even if the police in those very same circumstances do get a confidence statement, but fail to ask the witness whether he or she has spoken to anyone else about the identification, Henderson somehow holds that courts should automatically suppress that identification as well.

That reading of Henderson is inaccurate. Recall that Henderson retained the Ortiz standard for even permitting a pre-trial admissibility hearing at all. 208 N.J. at 288-89. Defendant must initially make a showing of some suggestiveness on the part of the police to get a hearing, and then must show a "very substantial likelihood of irreparable misidentification" to get the identification suppressed. 208 N.J. at 289. That is a heavy

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[1] The Attorney General Guidelines do, indeed, direct officers to document the identification procedure results with each witness, including confidence statements, instructing officers to "record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is." Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, § II.E.1.

burden, and requires a totality analysis focusing on both "undue suggestion" by the police and the factors that may make an identification more or less reliable. Failing to get a confidence statement, in and of itself, has nothing to do with suggestion. Neither, of course, does failure to get the names of people to whom the witness may have spoken.[2]

Third, we note that Henderson's requirements that police obtain confidence statements at the time of the identification, and that they also procure the names of individuals to whom the witness has spoken about the identification, were not couched in terms of admissibility. That puts them in stark contrast to the requirements set forth in State v. Delgado, 188 N.J. 48 (2006), where the Court expressly made the requirements of that opinion "a condition to the admissibility of an out-of-court identification." Id. at 63. If the Court intended to make these two requirements in Henderson absolute pre-conditions to admissibility of the identification evidence itself, it would have said so. The fact that it did not say so -- especially when coupled with the passage from the Henderson opinion quoted above -- indicates that the Court did not intend that outcome.

Moreover, the Henderson Court's citation to Delgado when pronouncing these requirements by no means implies that Henderson also was adopting the Delgado approach to admissibility. Instead, the citation was merely to reference case law support for the overall exercise of the Court's supervisory authority. In that regard, we add that simply because the Court exercised its supervisory authority in pronouncing these two requirements, it does not follow at all that those requirements therefore become pre-conditions to admissibility of the identification evidence itself. Indeed, the Court has exercised that same form of authority in prior opinions, without adding a strict suppression remedy for failure to adhere to its mandate. See, e.g., State v.

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[2] That is not to say that it would be outside of a trial court's discretion to convene a hearing, if it saw fit, as to the police's failure to abide by the Henderson Court's directive to obtain a confidence statement at the time of the identification procedure. Any information derived from such a hearing might influence the manner in which the trial court exercised discretion under N.J.R.E. 403 concerning evidence relating to the witness's confidence, in the manner referenced by Henderson as quoted above. 208 N.J. at 298. But again, that hearing would not concern the admissibility of the identification itself if there was no evidence of suggestiveness.

Cook, 179 N.J. 533 (2004). And even assuming there can be a legitimate difference of interpretive opinion on this issue, resolution of competing substantive legal positions is appropriately left to litigation, not committee rule making.

For the foregoing reasons, the current draft of the proposed Rule, as approved by the Committee on November 16, correctly places these factors in subsection (c), not (b), as the failure to record either of these requirements does not per se negate admissibility. Accordingly, the Committee should reject the attempt to re-open its vote on the eyewitness identification court rule to make the substantive revisions proposed in the December 9, 2011 letter submitted by Deputy Public Defender/NJSBA representative Barker.

Respectfully submitted,

Boris Moczula
Assistant Attorney General