SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4316-15T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KWESI GREEN,

Defendant-Respondent.

Submitted December 13, 2016 – Decided December 11, 2017

Before Judges Fisher, Leone and Vernoia (Judge Leone dissenting).

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-06-1659.

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for appellant (Lucille M. Rosano, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Peter T. Blum, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

The State appeals, by leave granted, the trial court's order suppressing an out-of-court identification of defendant Kwesi Green by the victim of an alleged armed robbery. For the reasons that follow, we vacate the order and remand the matter for further proceedings.

I.

The evidence presented during the court's hearing on defendant's suppression motion showed that at 8:15 a.m. on February 11, 2014, C.F.[1] was at a bus stop in Newark. A man approached her, pointed a black handgun at her chest, demanded her pocketbook, and asked questions about her belongings. She handed the man her pocketbook, and he walked to a waiting vehicle and departed.

Later, at the police station, C.F. provided a description of her assailant to Detective Donald Stabile. She said the assailant was "approximately 5'7" in height, [with] dark skin, clean-shaved, [] weight between 130 to 150 pounds," had short hair, and was in his early twenties.

Based on C.F.'s description, Stabile input search criteria into a database known as HIDTA (High Intensity Drug Trafficking Area), which is comprised of digital photos of individuals who were previously arrested. A computer photo management system

[1] We employ initials to protect the privacy of the alleged victim.

culls through the digital photos in the HIDTA database, selects those sharing the search parameters, and makes the selected photos available for viewing on a computer.

Stabile testified the following search criteria were entered into the photo management system: black male, dark brown skin, short hair, no facial hair, twenty to twenty-five years old, 130 to 150 pounds, and 5'7" tall. Stabile did not, however, record or otherwise memorialize the search criteria when they were entered into the system. He could not provide the number of photos the system selected in response to his entry of the search criteria, but testified that "[u]sually, it's a lot."

After the search criteria were entered, C.F. viewed the selected photos on computer screen pages consisting of six photos each. Stabile did not record or memorialize his instructions to C.F., but testified that he told her to look at the screen pages, and that if she did not see the assailant, she should click on the computer screen to view the next page of photos. He told C.F. to notify him if she saw the assailant or anyone that looked "similar."

After several minutes, C.F. advised Stabile that she saw a photo of someone who "look[ed] like [the assailant]." Stabile did not know how many pages of photos C.F. looked through prior to pointing out the individual she believed looked like the assailant,

and he did not record or print the photo she selected or the photos of the other five individuals whose pictures were on the same computer screen page. Stabile testified he could not save the photos C.F. had previously viewed on the computer, but acknowledged he could have printed the six photos appearing on the page C.F. viewed when she identified the person who looked like her assailant.

Stabile used a feature on the photo management system to highlight the photo of the person C.F. said looked like her assailant. This resulted in a refined search of the photos in the database based on the specific characteristics associated with the person in the highlighted photo. Use of the revised search criteria generated a smaller number of photos for C.F.'s review.

Stabile again instructed C.F. to review the screen pages of photos and advise if she saw her assailant or anyone that looked similar. After viewing only the first screen of six photos produced following the revised search, C.F. said, "this is the guy" and pointed to defendant's photo. Stabile downloaded and printed defendant's photo but did not print the other five photos on the screen page. C.F. then provided a formal statement describing the robbery and identifying defendant, through his photo, as her assailant.

A grand jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a). Defendant moved to suppress C.F.'s out-of-court identification, alleging the State failed to comply with the requirement that law enforcement record out-of-court identification procedures as required by State v. Delgado, 188 N.J. 48 (2006). The court conducted an evidentiary hearing on defendant's motion, and heard testimony from Detective Stabile and Robert Vitale, a computer systems engineer employed by DataWorks Plus.[2]

Stabile testified concerning the HIDTA database and C.F.'s identification of defendant's photo. Stabile used HIDTA "hundreds of times" as an investigative tool and explained the photos in the HIDTA database were from individuals arrested by the Newark Police Department. Stabile also testified that an individual's photo may appear multiple times in a single search of the database, depending on the number of times the individual had been arrested and photographed.

[2] DataWorks Plus designed and owns the photo management system used by the Newark Police Department to search the photos in the HIDTA database.

Vitale testified as an expert witness for defendant. Vitale testified the HIDTA database includes photos of individuals arrested in seventeen counties in Northern New Jersey, New York City, and Pennsylvania, and "encompass[es] millions of photographs." The photo manager computer system permits a search of the HIDTA database in two different modes: "witness mode" and "investigative mode."

In witness mode, photos meeting the selected search criteria are displayed on the computer screen. The officer determines how many photos will be displayed on each computer screen page. When photos are viewed in witness mode, the individual is able to check any of three boxes under each photo marked "yes," "no," or "possible." Photos displayed or selected can be printed. At the end of a viewing session, an officer can exit witness mode, save the search on the computer, and generate a report identifying the photos viewed, how long each photo was displayed, and the boxes checked for each photo. A photo can appear multiple times during a search conducted in witness mode, and if a report is generated it can be determined how many times a particular person's photo was shown during a viewing session.

In investigative mode, photos are displayed on the computer based on the search criteria entered by the officer. The officer also determines the number of photos that will appear on each

computer screen page for viewing. Photos displayed or selected can be printed. However, searches conducted in investigative mode cannot be memorialized in a computer-generated report.

In investigative mode, the officer can highlight a photo of a person that a witness indicates looks "similar" to an assailant. In doing so, the officer narrows the search based on the criteria associated with the highlighted photo. After a photo is highlighted, it is automatically included in each of the succeeding groups of selected photos appearing on the computer screen pages. The officer can preserve a displayed page of photos by digitally saving and printing it.

After hearing the testimony and oral argument, the court granted defendant's motion to suppress C.F.'s out-of-court identification. The judge found that although the testimony of Stabile and Vitale was inconsistent in some respects, they were credible witnesses. The judge determined it was feasible for the police to have maintained a record of the following eleven photos: the "initial" photo C.F. said looked like her assailant, and the other five photos on the screen when C.F. chose the initial image while viewing the photos in the investigative mode; and the additional five photos that appeared on the computer screen with the photo of defendant C.F. selected while viewing the photos in

the investigative mode. The judge determined it was feasible to print the photos because Stabile had printed defendant's photo.[3]

The court concluded that the State's failure to maintain a record of the eleven photos violated Rule 3:11 and the requirement to maintain records concerning out-of-court identification procedures established in Delgado and State v. Earle, 60 N.J. 550 (1972). The court further determined the State did not provide a satisfactory explanation for its failure. The judge found that the suppression of C.F.'s out-of-court identification was appropriate "in view of the clear fact that the officer [] had the capability to print out the . . . six photographs in both the initial viewing and the viewing where the defendant was identified, and the officer inexplicably did not do that." The court further noted the suppression did not bar C.F. from making an in-court identification of defendant because there was no "taint issue" presented, but rather a failure to comply with the recording requirement.

The judge entered an order suppressing C.F.'s out-of-court identification. The court stayed its order to permit the State

[3] The judge determined he did not need to address whether it was feasible for the police to maintain a record of all the images C.F. viewed before she saw the photo of the person she said looked like her assailant image. The judge found the identification inadmissible based on the failure to save the eleven photos.

to file a motion for leave to appeal. We granted the State's request. On appeal, the State argues:

> Point I
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> The Investigation Of "An As Yet-To-Be-Determined Suspect"[] By The Use Of The HIDTA System Is Not An Identification Procedure That Must Be Recorded Per Rule 3:11. The Trial Court Abused Its Discretion When It Found That The Victim's Perusal Of Randomly-Generated Photographs On HIDTA Triggered The Application of Rule 3:11, Requiring The Preservation Of The Last Twelves Photographs, When The Victim Pointed To A Photograph Of An Individual Who Looked "Similar" to The Perpetrator.
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> A. The Recordation Requirement of [Rule] 3:11 Does Not Apply to this Case Because Detective Stabile did not Prepare, and the Victim did not View, a Photo Array Containing the Photograph of a Known Suspect.
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> B. Even if the Last Twelve Photographs Constituted Arrays Which Should Have Been Preserved, Detective Stabile Complied with the Requirements of [Rule] 3:11(b) and (c) Because He Made a Nearly Contemporaneous Recording of the Identification Procedure.
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> C. The Application of System and Estimator Variables as Described in [Henderson] Shows that the Out-of-Court Identification of Defendant was not Suggestive or Unreliable, and Therefore Should Have Been Admitted.
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> D. Assuming the Failure to Preserve all Twelves Photographs Violated [Rule] 3:11, the Appropriate Remedy is a Properly Tailored Jury Instruction, not Suppression of the Out-Of-Court Identification.

II.

"Our standard of review on a motion to bar an out-of-court identification . . . is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div.), certif. denied, 228 N.J. 247 (2016). "We are bound to uphold a trial court's factual findings in a motion to suppress provided those 'findings are "supported by sufficient credible evidence in the record."'" State v. Watts, 223 N.J. 503, 516 (2015) (quoting State v. Elders, 192 N.J. 224, 243-44 (2007)). However, we do not defer to a trial court's interpretation of the law, which is reviewed de novo. Ibid.

The State argues the court erred by finding the police had an obligation to preserve the eleven photos C.F. viewed during the identification procedure resulting in her selection of defendant's photo. The State contends the requirements of Rule 3:11(a) apply only to "[a]n out-of-court identification resulting from a photo array, live lineup, or showup identification procedure" that includes a known suspect. The State asserts that Rule 3:11(a) does not apply where, as here, the identification procedure involves a review of photos for investigatory purposes to identify an as-yet-to-be-determined suspect. We disagree.

Our courts have long held that law enforcement is required to preserve and maintain records of identification procedures. In

Earle, supra, the Court considered law enforcement's failure to preserve the identity of individuals who were viewed during a live lineup. 60 N.J. at 552-53. The Court held law enforcement was required to "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." Id. at 552. Law enforcement's obligation includes preserving the identity of the individuals in a live lineup, including taking a picture of the lineup if it is possible to do so. Ibid. The obligation to preserve evidence is not limited to procedures resulting in an identification. Ibid. The Court held that "[i]f the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited." Ibid.

In Delgado, supra, the Court considered whether "police have a duty to record details of out-of-court identification procedures that result in positive identifications and non-identifications as well as near misses and hits." 188 N.J. at 58. Recognizing the "frailty of human memory and the inherent danger of misidentification," and that misidentification was "the single greatest cause of wrongful convictions in this country," the Court concluded that "[r]equiring the recordation of identification procedures, to the extent feasible, is a small burden to impose

to make certain that reliable evidence is placed before a jury and that a defendant receive a fair trial." Id. at 60-61.

The recordation requirement is not limited to procedures resulting in an identification of the defendant; it also applies to identifications made of individuals other than the defendant, and attempted identifications. Id. at 59; see also United States v. Ash, 413 U.S. 300, 318-19, 93 S. Ct. 2568, 2578, 37 L. Ed. 2d 619, 632 (1973) ("Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution."); Earle, supra, 60 N.J. at 552 (holding the obligation to make a record of photos shown applies where an identification is "made or attempted"); State v. James, 144 N.J. 538, 561 (1996) ("The victim's initial choice of someone else's photo suggests that some other person may have been the perpetrator.").

The Delgado Court invoked its supervisory powers under Article VI, Section 2, Paragraph 3 of the New Jersey Constitution "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, supra, 188 N.J. at 63. The Court found that because preservation of the words exchanged between a witness and police officer may be "as important as preserving either a picture of a live lineup or a photographic array," "[w]hen feasible, a verbatim account of any exchange between the . . . officer and witness should be reduced to writing," and "[w]hen not feasible, a detailed summary of the identification should be prepared." Ibid.; see also State v. Henderson, 208 N.J. 208, 252 (2011) ("Of course, all lineup procedures must be recorded and preserved in accordance with the holding in Delgado, supra, 188 N.J. at 63, to ensure that parties, courts, and juries can later assess the reliability of the identification.").

The Court imposed the recordation requirement in accordance with its "supervisory role over the court system to ensure the integrity of criminal trials," and its "policy concerning pretrial discovery [of] encourag[ing] the presentation of all relevant material to the jury." Id. at 62 (quoting State ex rel. W.C., 85 N.J. 218, 221 (1981)). The Court "refer[red] to the Criminal Practice Committee the preparation of a rule for [the Court's] consideration incorporat[ing] the recording requirements for out-of-court identifications." Id. at 64.

The Supreme Court Committee on Criminal Practice proposed a rule in response to the Court's directive in Delgado, and the Court's discussion of Delgado and related issues pertaining to eyewitness identifications in Henderson and State v. Chen, 208 N.J. 307 (2011). Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:11 (2017); Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-of-Court Identification Procedures and Addressing the Identification Model Charges at 1-2 (Feb. 2, 2012) ("Committee Report"). In 2012, the Supreme Court adopted Rule 3:11,[4] "Record of an Out-of-Court Identification Procedure," which states:

> (a) Recordation. An out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made.
>
> (b) Method and Nature of Recording. A law enforcement officer shall contemporaneously record the identification procedure in writing, or, if feasible, electronically. If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall

[4] The Rule was adopted on July 19, 2012, and became effective on September 4, 2012. Pressler & Verniero, Current N.J. Court Rules, note on R. 3:11 (2017).

include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be made, a detailed summary of the identification should be prepared.

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

(1) the place where the procedure was conducted;

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

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

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

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

(6) the identity of persons who witnessed the live lineup, photo lineup, or showup;

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

(8) the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes

> the identification of both law enforcement officials and private actors who are not associated with law enforcement.
>
> (d) Remedy. If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure, and if it was feasible to obtain and preserve those details, the court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.
>
> [R. 3:11.]

Here, the court found that C.F.'s out-of-court identification was inadmissible under Rule 3:11 because it was feasible to preserve the eleven photos, but the police failed to do so. The State, however, contends that Rule 3:11(a) is inapplicable because the conditions for admissibility of out-of-court identifications are limited to an "identification resulting from a photo array, live lineup, or showup identification procedure," and C.F.'s identification resulted from a review of an electronic "mug book" of as-yet-to-be-determined suspects.

The State relies on three decisions that predated the enactment of Rule 3:11. In State v. Ruffin, 371 N.J. Super. 371 (App. Div. 2004), we distinguished between identifications resulting from a review of books containing hundreds of photos

from those resulting from a review of "arrays of a relatively small number of photographs to see if identifications could be made of targeted suspects," id. at 395, and held that law enforcement's failure to preserve mug books shown to a witness for investigatory purposes did not render the witness's out-of-court identification inadmissible, id. at 397-98.

Our decision, however, was based on the feasibility of law enforcement's maintenance and preservation of mug books that are used for investigative purposes. We concluded that the mug books were "used as a[n] on-going photo display for investigative purposes," and that "requiring the segregation of all photographs and books viewed by witnesses who make identifications until disposition of the matters, possibly through trial and appeal" would "[n]ot only be cumbersome, but [] would also place an unnecessary burden on investigating processes and hinder or even eliminate the use of a traditional, non-invasive and proper law enforcement tool for no justifiable purpose." Id. at 395.

Subsequently, we held computer-generated displays of photos were akin to mug books, and thus, the failure to retain the photos did not render an identification inadmissible. State v. Janowski, 375 N.J. Super. 1, 7-9 (App. Div. 2005). We reasoned that "[i]nstead of going to a shelf and removing only the books containing mug shot photographs of" individuals fitting the

victim's description, the officer "went to the computer and retrieved only the mug shot photographs of those with the same characteristics." Id. at 6-7. Because "the computer system contained large numbers of randomly selected photographs, kept for the purpose of investigation, not confirmation, and [was] a resource 'shown to witnesses as a matter of course to see if a suspect [could] be found,'" we concluded the computer system was equivalent to a mug book. Id. at 8-9. Relying on our decision in Ruffin, we determined that the failure to retain the photos viewed by the victim did not render the out-of-court identification inadmissible. Id. at 9.

Following the Court's decision in Delgado, in State v. Joseph, 426 N.J. Super. 204, 221-24 (App. Div.), certif. denied, 212 N.J. 462 (2012), we considered the admissibility of an out-of-court identification made during a review of photos in the HIDTA[5] database. We relied on our decision in Janowski, found the HIDTA system was "essentially a mug shot book," and again determined "the failure to retain all photographs in a computer system viewed

[5] In Joseph, we used the acronym HIDA for the same High Intensity Drug Trafficking Area database used by Stabile here to show photos to C.F. Joseph, supra, 426 N.J. Super. at 213. We employ the acronym HIDTA for consistency with the motion court's references to the database.

by a victim is not fatal to the admission of an out-of-court identification." Id. at 223.

Although the State relies on Ruffin, Janowski, and Joseph, which were decided prior to the Court's adoption of Rule 3:11, the motion court relied on the Rule as the basis for its decision concerning the admissibility of C.F.'s out-of-court identification. The State argues Rule 3:11 does not apply because C.F.'s review of the mug books did not constitute "a photo array . . . identification procedure" within the meaning of Rule 3:11(a), and the Rule applies only to the preservation of a photo array identification procedure that includes a known suspect, and not to photo array identification procedures including only as-yet-to-be-determined suspects. We therefore consider whether Rule 3:11 required the exclusion of C.F.'s identification.

"We apply familiar canons of statutory construction to interpret the court rules." Robertelli v. N.J. Office of Att'y Ethics, 224 N.J. 470, 484 (2016). "We look first to the plain language of the rules and give the words their ordinary meaning." Ibid. "We also read the language of a rule 'in context with related provisions so as to give sense to the [court rules] as a whole.'" Ibid. (quoting Wiese v. Dedhia, 188 N.J. 587, 592 (2006)). In addition, "[i]f the text of the rules is ambiguous,

we can turn to extrinsic evidence, including committee reports, for guidance." Ibid.

We begin with the plain language of Rule 3:11. To be sure, it conditions the admissibility of "[a]n out-of-court identification" upon law enforcement's recordation of a photo array identification procedure.[6] R. 3:11(a). The Rule, however, does not define the term "photo array." Relying on Ruffin, Janowski, and Joseph, the State contends that the term "photo array . . . identification procedure" does not encompass a witness's review of mug books or arrays containing as-yet-to-be-determined suspects.

We recognize that prior to the enactment of the Rule, we relied on the distinction between mug books used for investigatory purposes and arrays consisting of a limited number of photos with a known suspect as a line of demarcation for law enforcement's obligation to preserve identification procedure evidence. See Joseph, supra, 426 N.J. Super at 223; Janowski, supra, 375 N.J. Super. at 8-9; Ruffin, supra, 371 N.J. Super. at 395-98. The

[6] As discussed infra, a failure to record an identification procedure in accordance with Rule 3:11 does not require that the court find an out-of-court identification inadmissible. The remedy for a failure to comply with the Rule is left to the court's "sound discretion." R. 3:11(d).

Supreme Court, however, did not incorporate the distinction into Rule 3:11.

The plain language of Rule 3:11 does not limit its application to photo array identification procedures that include a known suspect, or exempt from the recordation requirements photo array identification procedures that do not include known suspects. By its express terms, Rule 3:11(a) requires the recordation of identifications resulting from photo array identification procedures without regard to whether a known suspect is included in the photos shown. Thus, the State's argument that Rule 3:11 applies only where a known suspect is included in the photo array identification procedure finds no support in the plain language of Rule 3:11(a).

We also reject the State's contention that Rule 3:11(a) does not apply because C.F.'s review of what the State characterizes as an electronic mug book is not a photo array identification procedure. See Joseph, supra, 426 N.J. Super. at 223 (finding HIDTA database was equivalent to an electronic mug book). Again, the argument ignores the language of the Rule.

Rather than excluding out-of-court identifications resulting from a review of mug books from Rule 3:11's application, the Rule affirmatively requires that the record of an out-of-court identification procedure include the "mug books" used. R.

3:11(c)(5). The Rule states that "[t]he record of an out-of-court identification procedure is to include details of what occurred . . . including . . . if a photo lineup, the photographic array, mug books or digital photographs used." R. 3:11(c)(5). Thus, the Rule includes a witness's review of mug books as part of the "record of an out-of-court identification procedure" that must be made. R. 3:11(c).

Moreover, although subsection (a) of Rule 3:11 utilizes the term "photo array . . . identification procedure" and subsection (c) employs the term "photo lineup" identification procedure, we are satisfied the only reasonable interpretation of the Rule requires the conclusion that the "photo array . . . identification" referred to in subsection (a) includes each of the "photo lineup" identification procedures that are the subject of the recordation requirement set forth in subsection (c). A contrary interpretation renders meaningless Rule 3:11(c)(5)'s requirement that a record of mug books used be maintained, and would be inconsistent with our obligation to give effect to all of the provisions of the Rule. See Burgos v. State, 222 N.J. 175, 203 (2015) ("We do not support interpretations that render statutory language as surplusage or meaningless . . . ."), cert. denied, __ U.S. __, 136 S. Ct. 1156, 194 L. Ed. 2d 174 (2016).

We disagree with our dissenting colleague's reasoning that the term "photo lineup" in Rule 3:11(c)(5) limits the photo identification procedures for which preservation of "the photo array, mug books or digital photographs used" must be maintained. The dissent asserts that because the ordinary use of the term "photo lineup" is limited to photo arrays when a known suspect is included, the Rule requires only the preservation of photo arrays, mug books and digital photographs where they include a known suspect. In the first instance, the dissent disregards that photo lineups do not always, and need not, include a known suspect. In Henderson, the Court recognized that arrays may not include a known suspect. 208 N.J. at 267. The Court referenced a study involving "target absent arrays" in its discussion of the effect of "memory decay" on the accuracy of delayed out-of-court identifications. Ibid.

In our view, the dissent's reliance on the ordinary usage of the terms used in Rule 3:11(c)(5) is selective and inconsistent. The dissent asserts that the ordinary meaning of the term "photo lineup" includes only photo arrays with known suspects, but in its interpretation of Rule 3:11(c)(5), the dissent casts aside what it contends is the ordinary meaning of the term "mug books." The dissent argues that the ordinary meaning of the term "mug books" does not include the exhibition of a photograph of a known suspect

and, for that reason, there is no duty under Rule 3:11(c)(5) to preserve mug books used during an identification procedure. But Rule 3:11(c)(5) lists the use of mug books as an element of a photo lineup identification procedure. Thus, under the dissent's logic and its stated commitment to the ordinary usage of the Rule's terms, a mug book could never constitute a photo lineup because a mug book never includes a known suspect.

The dissent avoids this obvious inconsistency by wandering even further from the plain meaning of the Rule's terms. The dissent asserts that the Rule's use of the term "mug books" requires only the production of the page of a mug book used during a photo lineup that includes a photo of a known suspect.[7] This interpretation finds no support in the Rule's plain language; the Rule states that "mug books" must be preserved, not a page of a mug book that the police used as a photo array.

The dissent's interpretation of the term "mug books" to encompass only a page of a mug book that includes a known suspect means that "mug books" under the Rule are identical to a "photo array." Of course, subsections (a) and (c)(5) of Rule 3:11 separately require preservation of photo arrays and, thus, the

[7] Again, this interpretation contradicts the dissent's argument that mug books, by definition, do not include known suspects.

dissent's interpretation renders the inclusion of the term "mug books" meaningless and a mere surplusage.

Moreover, under the dissent's interpretation of Rule 3:11(c)(5), a photo lineup identification procedure is no different than the display of a photo array. But the Rule lists a photo array as only one of three records of photo lineup identification procedures that must be preserved. R. 3:11(c)(5). It separately requires preservation of the mug books and digital photographs used. Our interpretation of Rule 3:11(c)(5) gives effect to the plain and ordinary meaning of these different terms, and the Rule's requirement that they each be preserved.

We also reject any interpretation of Rule 3:11 that would limit its application to identification procedures using "typical" photo arrays "contain[ing] a small number of photographs," Janowski, supra, 375 N.J. Super. at 7. We are convinced such an interpretation is not supported by the language of the Rule, and is inconsistent with its clear purpose of ensuring defendants are provided with a record of the identification procedures utilized by law enforcement. Where, as here, the police displayed photos to C.F. in multiple pages consisting of six photos each, it would be illogical to conclude that C.F. was not shown "typical" photo

arrays,[8] or that the State could avoid the effects of Rule 3:11 by combining the multiple pages and characterizing what was shown as a mug book.

The Criminal Practice Committee's Report further supports this interpretation. In its discussions concerning the required contents of the record, the Committee "agreed that [the] 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." Committee Report, supra, at 22. A subcommittee "discussed whether its proposed rule . . . would govern all identification procedures or if an exception [was] needed . . . for identifications made at show ups or using mug books," and whether a "good cause" exception should be made in those circumstances. Id. at 23. However, the Committee decided to "include[] 'mug books' in the subsection of the rule addressing photo lineups." Id. at 24. Thus, the Committee informed the

[8] We also reject the State's position because a photo array identification procedure is not defined or limited by the number of the photos shown. For example, in State v. Madison, 109 N.J. 223, 225 (1988), the Court considered "out-of-court identification procedures" that included showing a witness separate "arrays" of "twenty-four" and "thirty-nine" photos. In State v. Gunter, 231 N.J. Super. 34, 37 (App. Div.), certif. denied, 117 N.J. 80, and certif. denied, 117 N.J. 80, 81 (1989), we addressed law enforcement's failure to preserve "three separate photographic arrays," consisting of thirty-five to forty photos, fifteen photos, and six photos respectively.

Court of its discussion concerning whether there should be an exception to the recordation requirement for mug books, and the Court included the requirement in Rule 3:11(c)(5).[9]

Moreover, separate from requiring a record of the mug books used during an identification procedure, Rule 3:11(c)(5) requires a record detailing the "digital photographs" used. Although the HIDTA database has been characterized as "essentially a mug shot book," Joseph, supra, 426 N.J. Super. at 223, and the State argues it should be considered as such here, the evidence showed it was a compilation of digital photos. As such, the plain language of R. 3:11(c)(5) requires that when digital photos are shown during an identification procedure, a record of the photos used must be made.

Our interpretation of the plain language of Rule 3:11 is also consistent with the Court's longstanding policy of ensuring that criminal defendants are entitled to broad discovery. See State v. Hernandez, 225 N.J. 451, 461 (2016) ("In New Jersey, an accused has a right to broad discovery after the return of an indictment

[9] The Attorney General's guidelines for identification procedures, revised following Henderson, supra, 208 N.J. 208, and Rule 3:11, also reflect the new standards under the Rule. See Office of the Att'y Gen., N.J. Dep't of Law and Pub. Safety, Memo of Clarification 1 (2012). Question 21 on the Attorney General's Photo Array Eyewitness Identification Procedure Worksheet asks, "[d]id you preserve the photo array, mug books, or digital photos used?" Id. at 2.

in a criminal case."); State v. Scoles, 214 N.J. 236, 252 (2013) ("a defendant has a right to automatic and broad discovery of the evidence the State has gathered in support of its charges"). The policy protects the interests of defendants facing the loss of liberty and other repercussions flowing from a criminal conviction, and ensures the integrity of the criminal justice process in our courts. See id. at 251-52 ("The sharing of pretrial information has received general support in recognition of its role in promoting a just and fair trial . . . [which] is a shared concern of both the defendant involved and the State.").

In addition, our interpretation of Rule 3:11 also gives effect to the Court's concerns about identification procedures expressed in Delgado and Henderson. In Henderson, supra, the Court addressed the danger of eyewitness misidentification, and identified variables that "can affect and dilute memory and lead to misidentifications." 208 N.J. at 218. Among the system variables, or variables within the State's control, the Court included pre-identification instructions, lineup construction, avoiding feedback and recording confidence, multiple viewings, simultaneous versus sequential lineups, and composites.[10] Id. at 248-59.

[10] The dissent asserts that Rule 3:11 could not be intended to require preservation of mug books because there is no possibility of undue suggestiveness by law enforcement until there is a known

These variables, which the Court found could affect the reliability of identifications, are pertinent not only when law enforcement has identified a suspect, but also in cases in which a suspect has not yet been determined. Of particular relevance to the present appeal is the multiple viewing variable. See id. at 255-56. As the Court noted, "[v]iewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem . . . is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure," and explained that "[m]ultiple identification procedures that involve more than one viewing of the same suspect . . . can create a risk of 'mugshot exposure' and 'mugshot commitment.'" Id. at 255. "Mugshot

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suspect. However, in Henderson, supra, the Court identified numerous system variables that are unrelated to whether law enforcement has a known suspect, but which may result in suggestiveness and affect the reliability of an identification. 208 N.J. at 248-59. Therefore, the fact that the officers may not have identified a suspect prior to showing C.F. the photographs does not, as suggested by the dissent, end the inquiry. The photographs reviewed by C.F., whether in mug books, photo arrays or otherwise, and the manner in which the photographs were shown to her are directly relevant to an assessment of the system variables necessary to determine if an identification procedure is suggestive in the first instance. The plain language of the Rule requires preservation of that relevant evidence. The dissent's contrary interpretation deprives defendants of the only evidence upon which a challenge to the reliability of the out-of-court identification based on the system variables could be based.

exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure." Ibid. Accordingly, the Court stated, "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once." Id. at 256.

In the computer-based photo search employed here, there was a risk of mugshot exposure. Both Stabile and Vitale testified that an individual's photo could appear multiple times in a single search of the HIDTA database, depending on how many times the individual had been arrested and photographed. Further, Vitale testified that when an officer highlights a "similar" photo in investigative mode, the "similar" photo will continue to be displayed on each succeeding page that is viewed. This evidence permits the possibility that C.F. viewed defendant's photo prior to finally selecting his photo,[11] making it difficult "to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." Id. at 255. The risk of such an

[11] There was no evidence presented concerning the number of times, if any, defendant had been arrested in the counties contributing to the HIDTA database prior to C.F.'s review of the photos.

occurrence reinforces the need for adequate recording procedures discussed by the Court in Delgado, supra, 188 N.J. at 63.[12]

In any event, the State's proffered interpretation of Rule 3:11 would create a void in the record of every case where mugshot exposure could affect the reliability of an identification. Under the State's and dissent's interpretation of Rule 3:11, there would be no obligation to preserve the record of a review of mug books, and thus there would be no record permitting a defendant to challenge a misidentification based on mugshot exposure. We are convinced such an interpretation is not only inconsistent with the plain language of Rule 3:11, but is also incompatible with Henderson's explanation of the variables affecting the reliability of identifications and Earle's requirement that where an "identification is made or attempted on the basis of photographs," Earle, supra, 60 N.J. at 552, there must be a record made of the photos shown.[13]

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[12] Preservation of the mug books during an identification may also affect a determination concerning the "simultaneous versus sequential" presentation of photos that the Court in Henderson found was a variable that can affect the reliability of an out-of-court identification. Henderson, supra, 208 N.J. at 256-58.

[13] We do not offer an opinion as to whether it was feasible for the officers to record or make a record of all of the photographs viewed by C.F. as she viewed them in the investigative mode. The court did not decide that issue. The court only determined that it was feasible to preserve the eleven photos at issue. We are

In our view, the dissent is unduly concerned about a perceived minor inconvenience for law enforcement rather than the protection of the rights of the accused – rights which, under our colleague's interpretation of Rule 3:11, are largely if not completely disregarded. Moreover, our interpretation of Rule 3:11 will not interfere with law enforcement's ability to effectively use mug books, will not render use of mug books unduly burdensome and should not discourage law enforcement's use of mug books.

Rule 3:11(d) requires that a court determine "if it was feasible to obtain and preserve" the record of the identification procedure otherwise required under subsections (a), (b) and (c). As such, a court must first determine whether it was feasible for law enforcement to preserve a mug book, whether it be a physical mug book or a computerized version, or otherwise make a record of all of the photographs reviewed during an identification procedure. R. 3:11-(d). There is nothing new in the requirement that a court consider the feasibility of the preservation of evidence of out-of-court identifications, see, e.g., Delgado, supra, 188 N.J. at 61 (observing that "[r]equiring the recordation of identification procedures, to the extent feasible, is a small

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satisfied that determination is supported by sufficient credible evidence in the record. See Watts, supra, 223 N.J. at 516.

burden to impose"); Earle, supra, 60 N.J. at 552 (holding law enforcement must "make a complete record of an identification procedure it is feasible to do so"), and therefore our interpretation of Rule 3:11 does not impose an obligation on law enforcement that it does not already have — preserving mug books used during identification procedures when it is feasible do so.[14]

In sum, we are satisfied the court correctly determined that Rule 3:11 applied to C.F.'s review of the six photos she was shown when she initially identified the person that looked like her assailant, and the five photos shown with defendant's photo when C.F. made the identification. We next address the court's determination that the failure to preserve the photos required the suppression of C.F.'s identification.

III.

Although Rule 3:11(a) conditions the admissibility of an out-of-court identification upon the making of "a record of the identification procedure," the court has discretion in fashioning a remedy where, as here, "the record that is prepared is lacking

[14] Our dissenting colleague asserts that our interpretation of Rule 3:11 renders "unlawful" law enforcement's failure to comply with its requirements. We respectfully disagree. There is nothing in either the Rule or our interpretation of it that renders a failure to comply with its terms an "unlawful" act. Instead, a failure to comply with the Rule constitutes only a violation of the Rule permitting imposition of an appropriate remedy. See R. 3:11(d).

in important details as to what occurred at the out-of-court identification procedure, and . . . it was feasible to obtain and preserve those details." R. 3:11(d). "[T]he court may, in its sound discretion and consistent with appropriate case law, declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification." Ibid.

The trial court suppressed C.F.'s identification based on Stabile's failure to preserve the eleven photos. The judge noted there was a "range of remedies" available, but found it was feasible for the officer to print the photos. The court relied on the officer's "inexplicabl[e]" failure to print the eleven photos and determined that suppression of the identification was appropriate.

The court's determination that it was feasible to preserve the eleven photos is supported by the evidence. As the court noted, the photos could have been preserved by simply printing copies of them. Moreover, had C.F. been shown the photos in the available witness mode,[15] a report showing the photos viewed and

[15] The evidence showed Stabile showed Fuller the photos in investigative mode. Stabile highlighted the photo of the person C.F. said looked like her assailant and refined the search criteria

the time each was displayed. Thus, it was feasible not only to preserve the eleven photos at issue here, but also to obtain a report detailing all of the photos viewed by C.F.[16]

In our view, however, the court's decision to exclude C.F.'s out-of-court identification was made without a full consideration of the alternative remedies available under Rule 3:11(d), and without an explanation as to why suppression was the appropriate remedy under the circumstances presented. Accordingly, we vacate the court's order and remand for the court to consider if it is appropriate to "declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification." R. 3:11(d).

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on that basis. That feature of the photo management system is available only in investigative mode.

[16] The digital nature of the photos, their retention in a computer database, the ability to print the photos, and the availability of a computer-generated report concerning the photos viewed requires a different assessment of feasibility than the one undertaken in Ruffin. In Ruffin, we considered the feasibility of preserving physical books of photos that were otherwise required for use during the daily course of police investigations. Ruffin, supra, 371 N.J. Super. at 395. There is no similar issue regarding feasibility where, as here, the photos viewed may either be separately printed or preserved through a computer-generated report. We also observe that in Joseph, supra, 426 N.J. Super. at 221-24, and Janowski, supra, 375 N.J. Super. at 7-9, we were not required to consider the feasibility of making a record of the photographs shown to the witnesses.

Rule 3:11(d) requires that the court's discretion be exercised "consistent with appropriate case law." Our case law, however, has not mandated suppression of an out-of-court identification in every case where there is a failure to maintain an adequate record of an identification procedure. In Earle, supra, the Court addressed the remedy for a failure to preserve identification procedure evidence. The Court held that a failure is not fatal to the admissibility of the out-of-court identification, but "if not explained, should be weighed in deciding upon the probative value of the identification, out-of-court and in-court." 60 N.J. at 552; see also Joseph, supra, 426 N.J. Super. at 223 (finding that a failure to preserve photos used in an array did not "automatically result in the suppression of an out-of-court identification" (quoting Janowski, supra, 375 N.J. Super. at 9)).

In making the determination whether to suppress an out-of-court identification, "[t]he question is whether the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Janowski, supra, 375 N.J. Super. at 9. In Ruffin, supra, we overturned the trial court's suppression of an out-of-court identification because there was no showing the photos or identification procedure used were "so impermissibly suggestive as to give rise to a very

substantial likelihood of irreparable identification," and we found "[d]efendant's argument that the procedure might have been unfair is insufficient to suppress the photographic identification in light of the neutral procedure followed." 371 N.J. Super. at 397-98. These decisions are in accord with Henderson, which requires the suppression of an out-of-court identification only where it is shown that an identification procedure is impermissibly suggestive, and not "any time a law enforcement officer makes a mistake." Henderson, supra, 208 N.J. at 303.

We have also considered whether the police acted in bad faith. In Ruffin, supra, we reversed the trial court's exclusion of an identification where there was no showing the photos "were destroyed or withheld with the intent to subvert the rights of the accused or any other acts of bad faith." 371 N.J. Super. at 398. In Delgado, supra, we found that law enforcement's failure to provide details of the identification procedure in the police reports did not require suppression of the identification in part because "the police did not fabricate evidence." 188 N.J. at 66. Similarly, in Joseph, supra, we determined that "[the failure of law enforcement to preserve [the] photographs does not require suppression of a victim's out-of-court identification, where there is no evidence they acted in bad faith." 416 N.J. Super. at 223; see also Gunter, supra, 231 N.J. Super. at 39 (finding failure to

preserve photos used during identification procedure was not required in part because there was no showing of bad faith "on the part of the State"); cf. State v. Peterkin, 226 N.J. Super. 25, 42-43 (App. Div.) (affirming suppression of identification where the officer did not preserve photos shown to the victim and covered up the failure by manufacturing evidence), certif. denied, 114 N.J. 295 (1988).

We have further considered whether a defendant had an opportunity to develop an adequate record regarding the identification procedure during pretrial hearings. See Joseph, supra, 426 N.J. Super. at 224. Moreover, Rule 3:11(d) requires that the court consider whether, consistent with the applicable case law, an appropriate jury charge can be "used in evaluating the reliability of the identification."

We do not express an opinion on the remedy that should be imposed on remand. We direct only that the court consider the appropriate case law as required by Rule 3:11(d), make appropriate findings of fact and law, R. 1:7-4, and impose the remedy it deems appropriate based on the circumstances presented.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

LEONE, J.A.D., dissenting.

I am reluctantly compelled to dissent. The majority opinion contravenes our precedent, lacks legal support, and jeopardizes time-honored and modern methods to search for unknown perpetrators.

After C.F. was robbed at gunpoint, she was able to provide a description. However, the police had no idea of the identity of her assailant. Accordingly, Detective Donald Stabile had C.F. engage in the modern version of what witnesses in such cases have been doing for decades - looking through mug books. He inputted her description into the HIDTA database of arrestees' photographs, and the computer photo management system displayed photos sharing those characteristics. This was the computerized equivalent of mug books organized by characteristics such as sex, race, or age. Like a witness viewing page after page of photos in a mug book, C.F. viewed screen after screen of photos on the computer, until she saw a photo of someone who "look[ed] like" her assailant.

Stabile then clicked to highlight that photo, which caused the HIDTA system to perform a refined search of the database and display similar photos based on the specific characteristics of the highlighted photo. C.F. looked at the computer-refined next

set of six photos, pointed to defendant's photo, and exclaimed "this is the guy." Stabile printed that photo.

The majority opinion rules that once C.F. told Stabile she saw a photo of someone who looked like her assailant, Stabile should have printed that photo, the other five photographs being displayed on the screen with that photo, and the other five photos the system displayed in its refined search with defendant's photo.

However, the majority's ruling contravenes our recent and well-reasoned precedent, namely State v. Ruffin, 371 N.J. Super. 371 (App. Div. 2004), State v. Janowski, 375 N.J. Super. 1 (App. Div. 2005), and State v. Joseph, 426 N.J. Super. 204 (App. Div.), certif. denied, 212 N.J. 462 (2012). In each case, the police had victims use mug books or their computer equivalent to search for a perpetrator whose identity was unknown. In each case, we held it was appropriate to do exactly what Stabile did here — preserve only the photo the victim identified.

In Ruffin, supra, a police lieutenant had a victim look through "several loose-leaf books containing photographs of African-American males," with four arrest photos on each page. 371 N.J. Super. at 378. After reviewing many pages, the victim saw a photo of her assailant, and the lieutenant preserved only that photo. Id. at 378-79. The trial court excluded the victim's out-of-court identification, asserting the police were required

to preserve the other photos under State v. Earle, 60 N.J. 550 (1972). Ruffin, supra, 371 N.J. Super. at 380-81, 393.

We reversed. We ruled Earle and other "cases relied on by defendant are distinguishable because the photographic arrays or lineups were comprised of few photographs and a targeted suspect." Id. at 397. We differentiated such photo arrays containing a known suspect from the use of mug books to search for an unknown perpetrator. "Here [the victim] was given books to review containing hundreds of photographs in the hope of finding a suspect. The purpose was investigatory, not confirmatory. Defendant was not a suspect until he was identified by [the victim]." Id. at 395.

In Ruffin, we refused to require the police to preserve the other photos both because it was impractical and because the use of mug books to search for unknown perpetrators was a valuable, non-suggestive, investigative tool. "Not only would the procedure be cumbersome, but it would also place an unnecessary burden on investigating processes and hinder or even eliminate the effective use of a traditional, non-invasive and proper law enforcement tool for no justifiable purpose." Id. at 395. We found "there was no suggestion that either the photographs or their arrangement in the mug books was anything other than a neutral presentation." Ibid.

We applied Ruffin to computer-generated mug books in Janowski, supra. The detective had the victim use a computer to view photos of photos of arrestees of the sex, race, and age of the unknown assailant. 375 N.J. Super. at 4-5. The computer displayed twelve photos at a time, and the victim reviewed thirty-six to sixty photos. Id. at 5. When she identified the photo of her assailant, the detective preserved only that photo. Ibid. The trial court excluded the victim's out-of-court identification, finding all the photos viewed constituted a photo array. Ibid.

In Janowksi, we again reversed, distinguishing Earle. Id. at 6. We also held "the motion judge erred when he construed the display of photographs viewed by the victim as an array." Ibid. "While photographic arrays must be preserved to be admissible, the use of mug shot books to develop an as-yet-to-be-determined suspect does not require that all the photographs viewed in the mug shot books be preserved." Ibid. (citing Ruffin, supra, 371 N.J. Super. at 395). We found that, like a physical mug book, "the computer system here contained large numbers of randomly selected photographs, kept for the purpose of investigation, not confirmation, and is a resource 'shown to witnesses as a matter of course to see if a suspect [can] be found.'" Id. at 8 (quoting Ruffin, supra, 375 N.J. Super. at 395). We ruled that the computer photo system "was, in effect, a mug shot book," and that each

computerized display containing the twelve photographs was the equivalent of a page of a mug shot book." Id. at 6-7. We concluded the other photos, "'whether . . . physical or computer generated' . . . therefore need not be preserved." Id. at 6.

In Janowski, we ruled "[a] photographic array . . . is a different investigative device" than "the use of [physical or computerized] mug shot books to develop an as-yet-to-be-determined suspect." Id. at 6-7. "The police typically have someone in mind when they prepare a photographic array to be shown to a witness." Id. at 7. Thus, "police use photographic arrays to confirm or eliminate suspects." Ibid. As a result, "[p]hotographic arrays typically contain a small number of photographs." Ibid. "Moreover, police construct photographic arrays and personally present them to witnesses, unlike a mug shot book, which is already assembled." Id. at 8. Because photo arrays thus pose a risk of police suggestiveness, all of the photos "must be preserved [for the identification] to be admissible." Id. at 6.

By contrast, "[n]othing in the testimony given by [the detective] or the victim indicates that the [computerized mug book] procedure was suggestive." Id. at 10. "[O]ther than initially inputting the sex, race and age range provided by the victim, [the detective] had no control over how the system displayed the photographs." Ibid. "Because nothing . . . about

the manner in which the [computer system] displayed the images could be construed as an attempt to influence the victim to choose defendant's photograph, there is nothing to suggest that the identification procedure 'was anything other than a neutral presentation.'" Ibid. (quoting Ruffin, supra, 371 N.J. Super. at 395).

We reaffirmed Janowski and Ruffin in Joseph, supra. Moreover, Joseph applied their holdings to the very HIDTA photo management system at issue here. The officers inputted the victims' description of the sex, race, skin tone, height, build, and facial hair of the unknown assailant into the HIDTA system, and had each victim view the computer-generated photos separately. 426 N.J. Super. at 213-15. After each victim identified defendant's photo, the officer preserved only that photo. Id. at 214-15.

We affirmed the denial of Joseph's motion to suppress. Id. at 223-24. Again distinguishing photo arrays, we reaffirmed "the use of mug shot books to develop an as-yet-to-be-determined suspect does not require that all the photographs viewed in the mug shot books be preserved." Id. at 223 (quoting Janowski, supra, 375 N.J. Super. at 6 (citing Ruffin, supra, 371 N.J. Super. at 395)). We also reaffirmed "a collection on a computer of large numbers of randomly selected photographs, which are kept for the purpose of investigation and shown to witnesses as a matter of course to

see if a suspect can be found, is essentially a mug shot book." Id. at 273 (citing Janowski, supra, 375 N.J. Super. at 6-9).

We rejected Joseph's claim that preservation of the other photos was required, and distinguished Earle and State v. Delgado, 188 N.J. 48 (2006). Joseph, supra, 426 N.J. Super. at 221-22. We also reiterated that "[b]ecause neither [officer] . . . made any attempt to influence the victims to choose defendant's photograph, there is no evidence to support the claim that the out-of-court identifications were impermissibly suggestive." Id. at 226.

Thus, defendant's claim is clearly contrary to our recent precedent in Ruffin, Janowski, and Joseph. The majority opinion lacks any solid legal authority to justify contravening our three decisions and reaching a contrary result.

The motion court and the majority opinion relied on Earle and Delgado, but neither case addressed the use of physical or computerized mug books to search for an unknown perpetrator. Rather, they concern witnesses who viewed known suspects in physical and photo lineups, respectively. Earle, supra, 60 N.J. at 553; Delgado, supra, 188 N.J. at 53. Earle required preservation "if it is feasible to do so" of the names of "the persons participating in a lineup" and a photo of the lineup, and added that when "'the identification is made or attempted on the basis of photographs,' the array should be preserved." 188 N.J.

at 59 (quoting Earle, supra, 60 N.J. at 552). Delgado required preservation "[w]hen feasible" of other information about "a live lineup or a photographic array." Id. at 63.

We already distinguished Earle and Delgado in Ruffin, Janowski, and Joseph. We explained why the preservation requirements in Earle and Delgado for lineups and photo arrays containing a known suspect, which carry the risk of police suggestiveness, were inapplicable to the use of physical and computerized mug books to search for an unknown perpetrator, which lacks the same opportunity for police suggestiveness. There is no reason to second-guess our prior rulings.

The majority opinion also relies in part on State v. Henderson, 208 N.J. 208 (2011). In Henderson, "the Court revised the Manson/Madison test for evaluating eyewitness identification evidence in criminal cases." Joseph, supra, 426 N.J. Super. at 225 n.5.[1] However, the Court's seminal ruling in Henderson did not purport to address the issue before us.

Instead, like Manson and Madison, Henderson involved lineups, showups, and photo arrays containing a known suspect. See, e.g., 208 N.J. at 221-22 (noting the witness viewed "a photographic array" of eight photos including the suspect), 239-40. Our Supreme

[1] See Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Madison, 109 N.J. 223 (1988).

Court used "the term 'lineup' to refer to live lineups and/or photo arrays" in which the suspect was included. Id. at 242. The Court described showups of a known suspect as "essentially single-person lineups." Id. at 259.

The Court in Henderson addressed concerns arising from the presence of known suspects in live and photo lineups, which raised the risk of police suggestiveness. For example, the Court reviewed the "system variables" and expressed concern that: "lineups should not feature more than one suspect"; the "suspect should be included in a lineup comprised of look-alikes"; the police "should attempt to shield witnesses from viewing suspects . . . more than once"; the police cannot construct the lineup so "'the suspect stands out from other members of a live or photo lineup'"; the officer administering the lineup must be shielded "from knowing where the suspect is located in the lineup or photo array"; the witness must be instructed "that the suspect may or may not be in the lineup or array"; the police should not "signal to eyewitnesses that they correctly identified the suspect"; and "all lineup procedures must be recorded and preserved in accordance with the holding in Delgado." Id. at 248-52 (citation omitted).

The Henderson Court's later "list of system variables" reiterated that courts must consider whether: "the array or lineup contain[ed] only one suspect"; "the suspect st[oo]d out from other

members of the lineup"; "the witness view[ed] the suspect more than once"; "the administrator had no knowledge of where the suspect appeared in the photo array or lineup"; the witness was instructed "that the suspect may not be present in the lineup"; and the witness received feedback "about the suspect." Id. at 289-90.

The Court in Henderson made clear the purpose of its revised test was to deter and correct "suggestive police procedures." Id. at 293-94. The Court required a Wade hearing[2] "only if the defendant offers some evidence of suggestiveness." Id. at 218, 290-91. "To evaluate whether there is evidence of suggestiveness to trigger a hearing," courts consider the "system variables" designed for live or photo lineups, all of which concern police suggestiveness. Id. at 289-90. "[I]f no . . . evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing." Id. at 290-91. Only "[i]f some actual proof of suggestiveness remains" may courts "evaluate the overall reliability of an identification and determine its admissibility." Id. at 291.[3]

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[2] See United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

[3] "Henderson, like Madison and Manson, addresses . . . the need to deter police misconduct." State v. Chen, 208 N.J. 307, 326 (2011).

A live or photo lineup poses a risk of police suggestiveness. It is constructed by an investigating officer seeking to confirm a known suspect. The investigating officer chooses the persons or photos used to fill out the lineup.

By contrast, use of physical or computerized mug books where there is no known perpetrator does not provide the same incentive or opportunity for suggestiveness by the police. The decision to include photos in physical and computerized mug books is made not by individual officers creating a lineup to build a case against a known suspect, but by a police department or by multiple law enforcement agencies which have no particular crime or suspect in mind and no incentive to be suggestive. Nor is there opportunity to be suggestive. Rather than selectively including photos based on a known suspect, physical and computerized mug books generally include all photos from every arrest in the jurisdiction(s) over a period of time. This comprehensiveness makes the mug books more useful, because mug books are used to solve not just recent crimes but crimes from earlier periods when the perpetrator was younger-looking or had different hairstyles, facial hair, or scars.

Chen addressed "suggestive conduct by a private party." Id. at 310. "[W]here there is no police action, [Chen] require[d] a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of highly suggestive circumstances as opposed to simply suggestive conduct." Id. at 327.

Moreover, when an officer asks the witness to view physical or electronic mug books to search for an unknown perpetrator, he has no obvious incentive to be suggestive, because the perpetrator is unknown. The photos displayed are those that happen to be on a particular page, or are chosen by computer algorithm.

The majority opinion does not assert there is a risk of suggestiveness by the police when physical or computerized mug books are used to search for an unknown perpetrator. Rather, the opinion contends the absence of suggestiveness does not end the inquiry under Henderson. However, under Henderson, absent "actual proof" or "evidence" of suggestiveness, the inquiry is over. Id. at 288-91.

The only time the Henderson Court mentioned mug books was to note that "[i]t is typical for eyewitnesses to look through mugshot books in search of a suspect." Id. at 255. The Court then discussed that many investigations "involve multiple investigation procedures," that "mugshot exposure" may result if the same suspect is viewed "at a later identification procedure," and that "mugshot commitment" may occur if "a witness identifies a photo that is then included in a later lineup procedure." Id. at 255-56. The discussion makes clear the Court's concern was not with the initial "search" through the physical or computerized mug books, but with the "later lineup procedure[s]," where the police may engage in

suggestiveness by again showing the witness the suspect's photo. Id. at 255-56.

The majority opinion nonetheless asserts its rationale is supported by the following discussion in Henderson:

> Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem . . . is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure. . . .
>
> Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of "mugshot exposure" and "mugshot commitment."
>
> [Id. at 255 (emphasis added).]

However, the quoted language simply reiterated the Court's concern about repeating a suspect or suspect's photo in a later live or photo lineup procedure involving a known suspect. The Court did not impose any restrictions on the initial use of physical or computerized mug books to search for an unknown perpetrator.

The majority opinion cites the Henderson Court's conclusion that "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once." Id. at 256. However, the Court's reference to "suspects" and "fillers" shows the Court was discussing live and photo lineups, where the police include the known suspect and "fill" out the lineup by adding

several "fillers." Thus, the Court ruled "lineups should include a minimum number of fillers" and "one suspect," and instructed courts to consider whether "the array or lineup contain[ed] only one suspect embedded among at least five innocent fillers." See id. at 251, 277, 290.

By contrast, when physical or computerized mug books are used to search for an unknown perpetrator, there is no known "suspect." Further, there are no "fillers," both because law enforcement officials are not filling out a lineup, and because any or none of the photos might be the unknown perpetrator.

Thus, the majority opinion incorrectly applies Henderson's rules for lineups with a known suspect to the use of physical or computerized mug books to search for an unknown perpetrator. See Joseph, supra, 426 N.J. Super. at 221-23 (upholding mug book use despite the defendant's challenge that the HIDTA "system could have included more than one photograph of defendant").

Moreover, such application would be impractical. Officers cannot remove multiple photos of a perpetrator whose identity they do not know. The officers would have to remove all multiple photos of every single person in the physical mug books or the computerized mug book database. That is a far greater task than to "shield witnesses from viewing suspects or fillers more than once" in a police-created lineup involving a few persons or photos.

Henderson, supra, 208 N.J. at 256. It would be difficult to pick the most appropriate photo of each person and cull out all other photos of each person from physical mug books containing several hundred photos. See Ruffin, supra, 371 N.J. Super. at 378 (involving mug books containing at about 640 photos or more). It may be even more difficult with computerized mugbooks containing many thousands of pictures. See Joseph, supra, 426 N.J. Super. at 213 (involving "a database of photographs of individuals previously arrested in Essex County"); Janowski, supra, 375 N.J. Super. at 6 (involving a database of "the photographs of all individuals arrested by the Trenton Police").

Robert Vitale, the computer systems engineer, testified the HIDTA database contained "millions of photographs" of persons arrested in seventeen counties in Northern New Jersey, New York City, and Pennsylvania. Each person's photo could appear multiple times in the database, depending on how many times the person had been arrested and photographed. Vitale did not believe it was possible to remove all other photographs of each person.[4]

[4] The majority opinion is also impractical in suggesting Henderson's discussion of "Simultaneous v. Sequential Lineups" applies to the use of physical or computerized mug books. Henderson, supra, 208 N.J. at 256. "Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time." Ibid. Using a physical or computerized

The majority opinion's extension of Henderson's conclusion from lineups of known suspects to mug book searches for unknown perpetrators is not only impractical but also unnecessary, because there is no police suggestiveness to be counteracted. It would also jeopardize the utility of mug books, which contain all arrest photos, including multiple photos or persons arrested multiple times, in part because it makes the mug books more comprehensive and of greater use in solving crimes occurring over a period of time when the appearance of the perpetrator may have changed.

In any event, there is no evidence C.F. saw defendant's photo more than once. There is no claim that defendant was depicted in the photo she said "look[ed] like" the perpetrator. It was only after Stabile clicked on that photo and similar photos were displayed that C.F. saw defendant's photo and exclaimed "this is the guy." Thus, Henderson does not support the result the majority opinion reached.

The motion court and the majority opinion largely rely on Rule 3:11, but that rule was "adopted in response to" Henderson

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mug book to search for an unknown perpetrator would be impracticably time-consuming and exhausting if a witness had to look at each photo one at a time. In any event, the Court found "insufficient, authoritative evidence . . . for a court to make a finding in favor of either procedure," and so the Court did not preclude viewing multiple photos or suspects simultaneously. Id. at 257-58.

and Delgado. Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 3:11 (2018); see Delgado, supra, 188 N.J. at 68.[5] Like Henderson and Delgado, Rule 3:11 addressed "[a]n out-of-court identification resulting from a photo array, live lineup, or showup" involving a known suspect. R. 3:11(a); see R. 3:11(c)(6). The rule does not purport to address the use of physical or computerized mug books to search for an unknown perpetrator.

To support the opposite conclusion, the majority opinion notes the rule does not define "lineup" or "photo array," and thus does not restrict those terms to live or photo lineups including a known suspect. However, as discussed above, both Henderson and Delgado used the terms "lineup" and "photo array" to refer to physical or photo lineups containing a known suspect. The common legal definition of a "lineup" defines it as containing a known suspect: "A police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be

[5] See also 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 (Fed. 2, 2012) [Committee Report] at 5-6 (stating the rule is based on Delgado and Henderson, which concerned police photographic and live lineup procedures, rather than on Chen, which concerned conduct by private actors.

identified as the perpetrator of the crime." B. Garner, Black's Law Dictionary 1014 (9th ed. 2009).[6]

There is no reason to believe the Supreme Court or the Committee used the terms of art "lineup" or "photo array" in a different way than used in Henderson, Delgado, and common legal usage. "We apply familiar canons of statutory construction to interpret the court rules. We look first to the plain language of the rules and give the words their ordinary meaning." Robertelli v. N.J. Office of Attorney Ethics, 224 N.J. 470, 484 (2016) (citing N.J.S.A. 1:1-1; other citations omitted). As with a statute, a rule's

> words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the [drafters] or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.
>
> [N.J.S.A. 1:1-1.]

Thus, we "must 'ascribe to the [words of the rule] their ordinary meaning and significance . . . and read them in context.'" Wiese

[6] Similarly, a "showup" is defined as a one-person lineup involving a known "suspect." Black's Law Dictionary, supra, at 1413.

v. Dedhia, 188 N.J. 587, 592 (2006) (alteration in original) (citation omitted).

Applying those canons of construction, we must read Rule 3:11 as governing live and photo lineups involving a known suspect. The rule provides that "[a]n out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made." R. 3:11(a) (emphasis added). Specifically, "if a live lineup, a picture of the lineup" is required. R. 3:11(c)(4). Similarly, "if a photo lineup, the photographic array, mug books or digital photographs used" in the photo lineup must be preserved. R. 3:11(c)(5). Thus, the rule only sets recording requirements for "a live lineup," "a photo lineup," or "a showup," all of which contain a known suspect.

The majority opinion notes that Henderson, supra, discussed "target-absent arrays," which are defined as "lineups that purposely excluded the perpetrator and contained only fillers." 208 N.J. at 234 (emphasis added). However, that phrase was not a reference to the use of physical or computerized mug books to search for an unknown perpetrator. Nor was the Court suggesting that law enforcement perversely conducts lineups from which it purposefully excludes the perpetrator. Rather, the Court was

merely referring to the use of "target-absent arrays" in scientific research to study the accuracy of staged identification experiments. Id. at 234-35, 242, 250, 257, 260, 263, 265, 267. The Court's reference to scientists' experimental "target-absent arrays" was not a reference to law enforcement's use of physical or computerized mug books to search for an unknown perpetrator.

In holding the requirements of Rule 3:11 apply here, the majority opinion primarily relies on its reading of subsection (c)(5). That provision states:

> The record of an out-of-court identification procedure is to include details of what occurred at the out-of-court identification, including the following:
> . . . .
> (5) if a photo lineup, the photographic array, mug books or digital photographs used[.]
>
> [Rule 3:11(c)(5).]

Thus, subsection (c)(5) covers mug books and digital photos only "if [they are used in] a photo lineup," the Supreme Court's term for a lineup containing the photo of a known suspect. Ibid. The majority opinion's contrary reading ignores the limitation "if in a photo lineup."

The majority opinion asserts that subsection (c)(5) must apply to the use of physical or computerized mug books to search for an unknown perpetrator because otherwise the words "mug books

or digital photographs" in subsection (c)(5) would be meaningless surplusage. However, mug books and digital photographs could be used for a photo lineup of a known suspect by officers who do not go to the trouble of constructing a "photographic array." Ibid. If an officer investigating a known suspect conducts a photo lineup by showing the witness a page of a mug book containing the known suspect's photo, then the photographs on the page must be preserved.[7] Similarly, if an officer simply shows a witness digital photos including a known suspect's photo, then the digital photos must be preserved.

Therefore, when physical or computerized mug books are used in a photo lineup of a known suspect, subsection (c)(5) requires their preservation. When mug books are instead used to search for an unknown perpetrator, subsection (c)(5) does not require their preservation.

This commonsense reading gives meaning to the entire subsection. This reading gives meaning to the terms "mug books or digital photographs" because it recognizes that occasionally mug books and digital photos are used as photo lineups containing a known suspect which might not be a police-constructed

[7] The majority opinion argues a mug book could never be used for a photo lineup because a mug book never includes a known suspect. However, once a suspect is known, his photo may be found in a physical or computerized mug book if he has been arrested before.

"photographic array" as commonly understood. This reading respects subsection (c)(5)'s plain language by applying that subsection to mug books or digital photographs only "if [they are used in] a photo lineup" of a known suspect. R. 3:11(c)(5). This reading also is consistent with the remainder of Rule 3:11, which limits its applicability to "[a]n out-of-court identification resulting from a photo array, live lineup, or showup," all of which contain a known suspect. R. 3:11(a). Moreover, this reading recognizes that use of a physical or computerized mug book to search for an unknown perpetrator is not "a photo lineup" or "a photo array" as those phrases have been used in the rule, in the precedent, or in common legal parlance.

This reading also reflects the legislative history of the Rule. "If the text of the rules is ambiguous, we can turn to extrinsic evidence, including committee reports, for guidance." Robertelli, supra, 224 N.J. at 484 (citation omitted). The history of the drafting of Rule 3:11, including the Committee Report, confirm its plain language does not apply to the use physical or computerized mug books to search for an unknown perpetrator. The initial drafters of Rule 3:11 "discussed whether [the] proposed rule . . . would govern all identification procedures or if an exception needed to be made for identifications made at showups or using mug books." Committee Report, supra, at 23. The drafters

recognized "the unique circumstances surrounding 'showups' and 'mug books' as compared to traditional line ups and photo arrays." Ibid. As a result, the drafters did not include showups, and only "included 'mug books' in the subsection of the rule addressing photo lineups." Id. at 24 (emphasis added). The drafters explained, "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." Committee Report, supra, at 22 (emphasis added). They did not require the preservation of all the photos viewed when using physical or computerized mug books are instead used to search for an unknown perpetrator.

Rather, the initial drafters of Rule 3:11 limited its requirements to "a photographic or live lineup identification procedure." E.g., Committee Report, supra, at 5-6, 9, 11 & App. A (quoting the proposed Rule 3:11(a)). The Supreme Court altered the rule to limit its requirements specifically to "a photo array, live lineup, or showup." R. 3:11(a). By using these terms of art, and by including showups but not mug books, the Court chose not to apply the rule's requirements to the use of physical or computerized mug books to search for an unknown perpetrator. Thus, both the plain language and the history of the drafting of the rule are contrary to the interpretation of the majority opinion.

The majority opinion asserts that because the HIDTA computerized mug book displayed six photos on the screen at a time, it would be illogical to conclude it was not a photo array. However, a photo array includes a known suspect. This was not a photo array because the perpetrator was unknown. Contrary to the majority opinion, the State was not trying to avoid the effects of Rule 3:11 by combining multiple pages and characterizing what was shown as a mug book. Rather, this was a traditional use of mug books, here computerized, to search for an unknown perpetrator. Rule 3:11 does not apply because it governs lineups, photo arrays, and showups including a known suspect.

The majority opinion cites the Court's general policy of broad discovery in criminal cases. However, that cannot override the conscious decision of the drafters of Rule 3:11 to require the preservation of all photos only for lineups, photo arrays, and showups containing a known suspect, but not for the uniquely different use of physical or computerized mug books to search for an unknown perpetrator. Nothing in the Committee Notes or elsewhere suggests that the drafters of the rule intended to overrule Ruffin, Janowski, or Joseph, which were published before or while the Supreme Court was considering the proposed rule.

Nonetheless, the majority opinion holds that Rule 3:11 requires that a record of the mug books and digital photos used

be maintained whenever physical and computerized mug books are used. The majority opinion asserts its interpretation of Rule 3:11 does not impose an obligation on law enforcement that it does not already have. That assertion is based on its mistaken reading of Earle and Delgado, a reading we already rejected in Ruffin, Janowski, and Joseph. The majority opinion misconstrues Rule 3:11(c)(5) to impose a requirement to preserve all mug books used to investigate an unknown perpetrator, in direct contravention of Ruffin, Janowski, and Joseph.

The majority opinion's holding, carried to its logical conclusion, would require the preservation of all photos viewed when a witness uses physical mug books and computerized mug books such as the HIDTA system to search for an unknown perpetrator. That would make such use of mug books impractical.

As we recognized in Ruffin, supra, such a requirement is incompatible with the traditional use of physical mug books. Mug books are used to search for unknown perpetrators not just by one witness in one case but by many witnesses in numerous cases on an "on-going" basis, and the photos and books are "periodically changed or substituted." 371 N.J. Super. at 395.

> To require preservation of all photographs shown to witnesses during an investigation before suspicion focused on a suspect or suspects would create an exclusionary rule requiring the segregation of all photographs

> and books viewed by witnesses who make identifications until disposition of the matters, possibly through trial and appeal, at the pain of suppressing an otherwise proper identification.
>
> [Ibid.]

Requiring preservation would "be cumbersome" and place a "burden on investigating processes and hinder or even eliminate the effective use of a traditional, non-invasive and proper law enforcement tool." Ibid.

Such a requirement could also make impractical the use of the HIDTA computerized mug book system to search for unknown perpetrators. Because the perpetrator was unknown, Stabile used the system's "investigative mode," which selects photos based on the key criteria in the witness's description. Investigative mode does not permit the officer to use the computer to save a record of the actual photos displayed to the witness. At best, the officer can print the photos while they are on the screen. That would require the officer to interrupt the witness after every screen to print the photos, slowing the witness's review of the numerous screens in the computerized mug book, and making an already time-consuming process more frustrating and exhausting.

The majority opinion notes that Vitale testified a record of all of the photos viewed could be obtained if the HIDTA system had been operated in the witness mode. However, Vitale also testified

witness mode lacks a key feature available in investigative mode. Investigative mode allows an officer to click on a photo the witness believes looks similar to the perpetrator and have the computer display similar photos. That feature is of obvious value in refining a search for an unknown perpetrator, and here it resulted in the computer displaying the photo of defendant. Using witness mode would have limited or thwarted the search for the unknown perpetrator.[8]

Even if the police could record all of the photos a witness viewed in a search for an unknown perpetrator, such a requirement would needlessly burden investigations using this traditional and proper law enforcement tool. Our decision in Ruffin rejected such a requirement for physical mug books not just because it was

[8] The majority opinion argues its holding will not burden law enforcement's use of mug books because the "Remedy" provision, Rule 3:11(d), requires a court to determine "if it was feasible to obtain and preserve" the information required to be preserved by subsections (a), (b), or (c) before imposing a sanction for breach of the rule. However, the majority opinion burdens law enforcement's use of physical and computerized mug books to investigate an unknown perpetrator by making it a violation of Rule 3:11(c)(5) not to preserve all mug books and photos used. The majority opinion makes unlawful a traditional law enforcement tool we have repeatedly held to be lawful, requires what we have ruled is impractical, and tells officers who cannot use the tool without violating impractical rule not to worry because no remedy will be granted. The majority opinion will discourage officers from using mug books to investigate unknown perpetrators to avoid being labelled rulebreakers, or label as rulebreakers those who continue to use this traditional and necessary law enforcement tool.

impractical, but also because it was "unnecessary" and served "no justifiable purpose." Ruffin, supra, 371 N.J. Super. at 395. Our decisions in Janowski and Joseph rejected such a requirement for computerized mug books precisely because it was unnecessary and unjustifiable, and thus did not even need to consider whether it was practical. Because use of a computerized or physical mug book to search for an unknown perpetrator does not carry the risk of police suggestiveness posed when investigating officers construct a photo array or lineup containing a known suspect, the majority opinion's ruling is equally unnecessary and unjustifiable.

Moreover, there is no clear utility in preserving all the photos seen by a witness searching for an unknown perpetrator using a physical or computerized mug book. Preservation of the other photos in "a live or photo lineup" is useful because a lineup should be "constructed" by the officers so the known suspect does not "stand out from other members of the lineup." Henderson, supra, 208 N.J. at 251, 290. A physical or computerized mug book is not constructed by the investigating officers, and there is no known suspect on which to base such fine-tuning. Moreover, the screens or pages of a physical or computerized mug book cannot be held to the same standard as a constructed lineup.

Thus, it would be unnecessary and unjustifiable to require preservation of all photos viewed by a witness using physical or

computerized mug books to search for an unknown perpetrator. Yet the majority opinion's rationale, including its mistaken reading of Delgado, Henderson, and Rule 3:11, would inexorably lead to requiring the preservation of all photos viewed.

I recognize that the majority opinion's ruling, like that of the motion court, is more limited. The motion court ruled C.F.'s out-of-court identification was inadmissible because it was feasible to print "at least" the initial photo she said looked like the assailant, the other five photos being displayed at that time, and the six photos displayed after the initial photo was highlighted. The motion court said it "need not address whether it was feasible . . . to retain a record of all the images that Ms. [C.F.] viewed" because "it is sufficient to make the ruling of inadmissibility that it was certainly feasible . . . to save those twelve [photos]."

The majority opinion's ruling is similar, but it rejects any interpretation of Rule 3:11 that would limit its application to a small number of photos, denies a photo array is normally constrained in the number of photos shown, and observes the HIDTA system can preserve a record of all of the photos viewed in its more limited witness mode. Thus, the majority opinion's rationale and its preservation requirement could extend to all the photos a witness views while using physical or computerized mug books to

search for an unknown perpetrator. Such a requirement unduly burdens the use of these valuable investigative tools for searching for unknown perpetrators.

Even considering only the last eleven photos, the majority opinion's ruling contravenes our precedent, lacks legal support, and imposes an unnecessary burden on the use of the HIDTA system for no justifiable purpose. The motion court and the majority opinion imposed a requirement to print these eleven photos because it was feasible to print them. However, just because something is feasible does not make it required, especially as the justification for the requirement — police suggestiveness — is absent.

The penultimate six photos were just another screen of the several screens C.F. had viewed from the computerized mug book, selected randomly by the computer without any opportunity for suggestiveness by the officer. The only difference between this screen and all the screens previously viewed is that C.F. stated that one photo looked like her assailant. However, C.F. did not identify the person in that photo as her assailant, so there still was no known suspect and it was not a photo array.

It would be burdensome to require the preservation of all photos viewed after a witness sees a photo which looks like an unknown perpetrator, because the witness could have to look at

many screens before she sees a photo of the unknown perpetrator. Such a burden is unjustifiable absent police suggestiveness.

The next screen displayed photos of people who shared characteristics with the person in that photo. Although Stabile clicked on that photo, the computer selected the other photos. Creating it was not creating a photo array because there was still no known suspect. There is no showing that Stabile had any ability or incentive to insert a photo of a particular person into the photos displayed. Indeed, defendant agreed he was not claiming any type of impermissible suggestiveness by Stabile or any other officer. Thus, there was no reason to require the other five photos to be preserved.

As it happened, C.F. saw the photo of her unknown perpetrator — defendant - on that next screen. Stabile preserved defendant's photo because C.F. said defendant was her assailant. In doing so, Stabile followed the governing law set forth in our decisions in Ruffin, Janowski, and Joseph. Nothing in Delgado, Henderson, or Rule 3:11 made that choice improper. Therefore, I would rule Stabile properly preserved the requisite photo, and would reverse the motion court's decision.[9]

[9] The majority opinion instead vacates and remands for reconsideration of the remedy. Such reconsideration is appropriate because Stabile's actions were justified under Ruffin,

The record here does not fully explore the variety and capabilities of computerized mug books used throughout New Jersey, or the extent to which physical mug books are used in the many jurisdictions in the State. It may be that computerized mug book systems will become so capable and universally used, and the printing or saving of the photos viewed will become so effortless, that it will be viewed as desirable to extend the preservation requirement to the other photos seen when using mug books to search for an unknown perpetrator, even though there is no police suggestiveness to justify preserving the photos. However, that determination should be made by the rulemaking process, which can consider the many systems and jurisdictions. Until then, we should hew to our decisions in Ruffin, Janowski, and Joseph.

Janowski, and Joseph, because he preserved the photo C.F. identified and other important details of what occurred during the use of the mug book to search for the unknown perpetrator, and because that search did not have the risk of police suggestiveness posed by a live or photo lineup containing a known suspect.