

NOTICE TO THE BAR

CRIMINAL – AMENDMENTS TO COURT RULE 3:11 **(“RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE”)**

The Supreme Court by order dated May 26, 2020 has adopted amendments to Court Rule 3:11 (“Record of an Out-of-Court Identification Procedure”). The amendments, which are appended to this notice, become effective June 8, 2020.

The Court in State v. Anthony, 237 N.J. 213 (2019), and State v. Green, 239 N.J. 88 (2019), had asked the Court’s Criminal Practice Committee to review and make recommendations for refinements to Rule 3:11. The Court in Anthony requested specific revisions to Rule 3:11 to provide greater clarity concerning the preference for electronic recordation of identification procedures and its requirement for law enforcement to explain why such recordation was not feasible. 237 N.J. at 231-232. In Green, the Court requested revisions to Rule 3:11 to provide clearer guidance about the type of evidence law enforcement should preserve when a witness identifies a suspect from a digital or electronic database. 239 N.J. at 107-108. The proposed rule amendments were earlier published for comment by December 31, 2019 Notice to the Bar.



Glenn A. Grant, J.A.D.

Acting Administrative Director of the Courts

Dated: May 27, 2020

SUPREME COURT OF NEW JERSEY

It is ORDERED that the attached amendments to Rule 3:11 of the Rules Governing the Courts of the State of New Jersey are adopted to be effective June 8, 2020.

For the Court,

A handwritten signature in blue ink, appearing to read "S. P. ...", is written over the printed name of the Chief Justice.

Chief Justice

Dated: May 26, 2020

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

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

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

a detailed written summary of the identification procedure as soon as practicable and without undue delay, and explain in writing why an electronic recording and a contemporaneous, verbatim written account were not feasible.

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

- (1) the place where the procedure was conducted;
- (2) the dialogue between the witness and the officer(s) who administered the procedure;
- (3) the results of the identification procedure, including any identifications that the witness made or was unable [attempted] to make;
- (4) if a live lineup, then a picture of the lineup;
- [(5) if a photo lineup, the photographic array, mug books or digital photographs used;]
- (5) if a photographic array or sequential photo display, then the photos displayed;
- (6) if a digital database, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same screen;
- (7) if a paper mug book, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same page;

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

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

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

(d) ... no change.

Note: Adopted July 19, 2012 to be effective September 4, 2012; paragraph (a) amended, paragraph (b) caption and text amended, and paragraph (c) amended May 26, 2020 to be effective June 8, 2020.