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**MEMORANDUM**

**TO:** All County Prosecutors

**FROM:** Stephen J. Taylor, Director

**DATE:** October 4, 2012

**SUBJECT:** Revised Model Eyewitness Identification Procedure Worksheets

On July 25, 2012, Attorney General Chiesa advised all County Prosecutors that the Supreme Court had promulgated a new Court Rule governing the recordation of out-of-court eyewitness identification procedures. The new Rule, R. 3:11, which took effect on September 4, 2012, implements the Court's decision in State v. Henderson, 208 N.J. 208 (2011). In order to facilitate uniform compliance with the new Rule, the Attorney General indicated that his Office would disseminate a "checklist document" to "serve as a quick reference guide to ensure that all of the new Rule's requirements are satisfied in every case and not overlooked by officers in the field."

Pursuant to the Attorney General's instructions, on August 24, 2012, the Division of Criminal Justice provided County Prosecutors with model worksheets that law enforcement officers might use to quickly and accurately document the steps that were taken while conducting eyewitness identification procedures (photo arrays and showup identifications). Some questions have been raised by prosecutors concerning the original model worksheets distributed on August 24. The purpose of this memorandum is to address those questions and to provide County Prosecutors with revised model worksheets that resolve those issues.

While law enforcement agencies must implement procedures to ensure compliance with the recordation requirements set forth in Rule 3:11, police departments are not required to use the model forms developed by the Division of Criminal Justice. Furthermore, County Prosecutors are allowed to develop and issue their own worksheets to account for the specific eyewitness identification procedures that may be employed by police agencies within their jurisdictions.

Consider, by way of example, the manner in which departments present witnesses with photographs "sequentially," where the witness is shown one photograph at a time so that he or she cannot view multiple photographs simultaneously. Different local procedures may be used to control



the handling and viewing of the photographs. In some departments, the identification procedure administrator will physically hand the witness a single photograph, and then have the witness return the photograph to the administrator before being provided with the next photograph. (That is the sequential technique that was specifically alluded to in Question 17(c) of the 8/24/12 version of the model form.) Other departments place all of the photographs comprising the array in a special booklet so that the witness must flip the page to see the next photograph, thus preventing the witness from viewing more than one photograph at a time. Still other departments may use a mechanical viewing machine or a software program and video monitor so that a witness can only view one photograph at a time.

All of those techniques constitute the “sequential” presentation of photographs, as distinct from “simultaneous” presentation. Accordingly, the Division has prepared a revised model worksheet, which is attached. As noted above, County Prosecutors remain free to develop one or more customized worksheets for police departments in their jurisdictions.

Furthermore, the original model worksheet posed several questions concerning the way in which the photo array was prepared. See Questions 6-9 of the 8/24/12 version. However, the officer who administers the eyewitness identification procedure may not be able to answer questions concerning the preparation and composition of the array because he or she did not compile or arrange the order of the photos and, in fact, was “blind” as to whether the array contained a photo of the suspect and, if so, as to the location of any such photo within the array. Because these worksheets should be filled out and signed by the eyewitness identification procedure administrator, the attached revised model worksheet eliminates superfluous questions concerning the composition and preparation of the array. It is critical to note in this regard that the administrator is responsible for preserving the photo array that was shown to the eyewitness. The array itself will therefore document how many photos comprised the array, whether at least five fillers were used, the ordering of the photos in the array, and whether only one photo of the suspect was in the array.

Thank you for your input and cooperation in the implementation of these procedures.