

Shortly after this testimony, Investigator Valvo completely changes his position and testifies that he has a different procedure for the different parts of the photo array form:

Q: It seems as though you have a different procedure you follow on each side of this?

A: As far as checkmarks go, maybe. But as far as asking the questions, no. I always ask the questions. (T p 12 lines 9-12).

Contrast that with his earlier testimony:

Q: Is it your practice to check all of the boxes as you go along?

A: It is. (T p 10 lines 14-16).

These snippets of confusing testimony are directly contradictory with each other and bring to question the credibility of this witness' testimony.

The Erie County District Attorney's office has video and audio recording capabilities (T p 23 at line 4). They did not engage these for this matter (else we would have been provided them in discovery). We acknowledge there is no requirement for these procedures to be video recorded, but given the contradictory testimony of the Investigator who performed this procedure, it would have been clarifying.

Without video, capabilities for which were available, the Prosecutors have failed to meet their burden of going forward with *credible* evidence (People v Berrios, 28 N.Y.2D 361, 369 (1971); People v. Burton, 130 A.D.2d 675, 676 (2d Dep't 1987); People v. Quinones, 61 A.D.2d 765, 766 (1st Dep't 1978); *see* People v. Rumph, 199 A.D.2d 434, 435 (2nd Dep't 1993); People v. Martinez, 71 A.D.2d 905, 906 (2d Dep't 1979) (**Confusing and self contradictory evidence did not meet the prosecution's burden**).


The Prosecutors failed to establish the legality of this photo array procedure and it must be suppressed.

DATED: Buffalo, New York
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Yours etc.,

[REDACTED]

TO: Hon. [REDACTED]
New York State County Court
[REDACTED]
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