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**TO: ALL BERGEN COUNTY CHIEFS OF POLICE, POLICE DIRECTORS,
OFFICERS-IN-CHARGE, AND SHERIFF**

FROM: PROSECUTOR MARK MUSELLA

DATE: AUGUST 1, 2019

**SUBJECT: BERGEN COUNTY PROSECUTOR'S OFFICE LAW ENFORCEMENT
DIRECTIVE NO. 2019-6 REGARDING OUT-OF-COURT
IDENTIFICATION PROCEDURES SUPPLEMENTING PROSECUTOR
DIRECTIVES 2019-3 AND 2012-2**

On July 23, 2019, the New Jersey Supreme Court decided State v. Kwesi Green, which once again expanded the record-keeping obligations of police with respect to out-of-court identifications. In this case, the witness identified an unknown individual using a digital database of arrest photographs, the High Intensity Drug Trafficking Area (HIDTA) Digital Photomanager System.

As background, the HIDTA system can be used to identify criminal suspects by narrowing arrest photographs based on various witness identifiers (such as age or weight). If a witness indicates that an individual in a particular photograph resembles a criminal actor, the system can generate additional photographs of similar-looking arrestees for review. Additionally, if an individual has multiple arrests in the relevant area, the system will, unless otherwise instructed, display all of his or her arrest photographs. That particular attribute of the HIDTA system presents a potential problem often referred to as "mugshot exposure": the potential corruption of a witness's memory caused by exposure to multiple photographs or viewings of the same individual prior to an identification.

After reviewing the HIDTA system's unique capabilities, the Court expanded, in two ways, the procedures to be followed by police in recording out-of-court identifications. First, to allow for appropriate review of an out-of-court identification that uses a digital database of arrest photographs, administrators should preserve: (1) the photograph of the suspect the witness selected, along with all other photographs on the same screen, and (2) any photograph that a witness says depicts a person who looks similar to the suspect, along with all other photographs on that screen. For the few police departments that still use paper mugshot books, that record-keeping procedure similarly applies.



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Second, to guard against the risk of mugshot exposure, the State will now have the burden to show that a witness who makes an identification was not exposed to multiple photographs or viewings of the same individual prior to the identification. With respect to the HIDTA system, the Court noted that the system can be configured to prevent the display of multiple images of the same individual. Going forward, administrators should, as much as practicable, take steps to avoid the problem of mugshot exposure and document the steps taken.

The Court's ruling extends the trend of imposing strict controls over out-of-court identifications. Please be advised that the Court also mandated that Rule 3:11, which governs out-of-court identification procedures and standards, must be revised to reflect its ruling.



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