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Bergen County Prosecutor

# Office of the County Prosecutor

## County of Bergen

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

**FROM: PROSECUTOR GURBIR S. GREWAL**

**DATE: DECEMBER 27, 2017**

**SUBJECT: BERGEN COUNTY PROSECUTOR'S OFFICE LAW ENFORCEMENT DIRECTIVE NO. 2017-8 REGARDING THE RETENTION OF VIDEOS RECORDED BY LAW ENFORCEMENT**

### I. INTRODUCTION

On January 6, 2011, the Attorney General of New Jersey issued Directive No. 2011-1, establishing general guidelines for the retention of evidence. That directive is intended to provide for the retention of evidence in criminal cases to protect public safety and the interests of crime victims and their families, and to afford those who are serving a sentence for a crime the opportunity to challenge their convictions, in appropriate cases. It is available at <http://www.nj.gov/lps/dcj/agguide/directives/dir-2011-1-EvidenceRetention.pdf>.

This directive is meant to address issues raised in two recent cases that define particular aspects of the State's discovery obligations in Municipal and Superior Court cases.

In State v. Stein, 225 N.J. 582 (2016), the New Jersey Supreme Court ruled that the State, "has a duty to preserve evidence that it knows is relevant to a DWI prosecution." Id. at 597. The issue in Stein was the State's obligation to preserve and make discovery of videotapes of police interactions with a DWI defendant, including apprehension, arrest, sobriety tests, and in that case, Breathalyzer testing. The court reasoned that such videotape evidence is relevant, since it might reveal whether the defendant was under the influence of alcohol.

Therefore, under Stein, law enforcement is required to preserve all videotapes relevant to a DWI defendant's apprehension, testing, and processing. Upon request of the defense, those videotapes must be produced to a defendant in discovery.



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However, Stein does not mandate that any aspect of a DWI arrest be videotaped, it only mandates preservation and production of videotapes that are made in connection with a DWI arrest.

In State v. Richardson, 452 N.J. Super. 124 (App. Div. 2017), the defendant, who was arrested for a motor vehicle violation, was searched during the booking procedure and found to possess heroin. The booking procedure was videotaped. Defense counsel requested that the videotape be preserved and a copy produced in discovery. Notwithstanding that request, the videotape was not preserved.

The court ruled that in those circumstances, there was a discovery violation which entitled the defendant to a charge at trial that the jury could draw a negative inference against the State's position with respect to the defendant's alleged possession of heroin. In doing so, the court expressly stated that, "the State may not destroy law enforcement's video recording of an offense, particularly when a defendant has made a timely request to preserve it." Id. at 134.

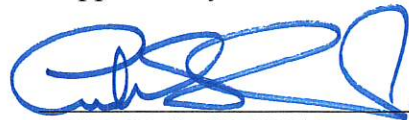
## II. RETENTION OF VIDEOTAPES FROM POLICE RECORDING SYSTEMS

As a result of the decisions in State v. Stein and State v. Richardson, we issue this directive.

In any case where law enforcement makes a video recording that contains information relevant to criminal or quasi-criminal charges against a defendant, the law enforcement agency must take appropriate steps to preserve all such video footage. In addition, law enforcement agencies must preserve all video recordings that relate to DWI prosecutions. These video recordings must be turned over to the defendant upon request.

Law enforcement agencies shall confer with the Bergen County Prosecutor's Office before turning over any evidence to a defendant in any indictable matter. In DWI cases, law enforcement should consult with the municipal prosecutor.

Finally, law enforcement agencies shall retain the video recorded evidence covered by this directive until a request for destruction is made to and approved by the Prosecutor's Office.



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c: All Bergen County Assistant Prosecutors