

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL LUPARDUS,

Defendant-Appellant.

Case No. 2008-2487

On Appeal from the Washington  
County Court of Appeals  
Fourth Appellate District

Case No. 08 CA 31

---

**MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS IN SUPPORT OF APPELLANT MICHAEL LUPARDUS**

---

Office of the Ohio Public Defender

Mark C. Sleeper # 0079692  
Marietta City Assistant Law Director

Sarah M. Schregardus #0080932  
Assistant State Public Defender

301 Putnam Street  
Marietta, Ohio 45750  
(740) 373-7624  
(740) 373-8748 (fax)

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (fax)  
sarah.schregardus@opd.ohio.gov

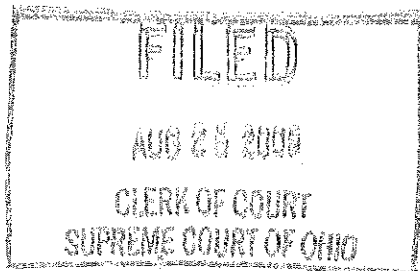
Counsel for Appellee  
State of Ohio

Counsel for Defendant-Appellant  
Michael Lupardus

D. Timothy Huey #0023598  
(Counsel of Record)  
3240 Henderson Road  
Columbus, Ohio 43220  
(614) 487-8667; (614) 573-7232  
dthlaw@gmail.com

Jeffrey C. Meadows #0067689  
Lyons & Lyons Co., LPA  
8310 Princeton-Glendale Rd.  
West Chester, Ohio 45069  
(513) 777-2222; (513) 870-5442 (fax)

Counsel for Amicus Curiae,  
Ohio Association of Criminal Defense Lawyers



## TABLE OF CONTENTS

### Page No.

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE AND FACTS .....	1
INTEREST OF AMICUS CURIAE.....	1
APPELLANT'S PROPOSITION OF LAW:	
If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.....	2
CONCLUSION .....	6
CERTIFICATE OF SERVICE .....	6
APPENDIX.....	A-1

## TABLE OF AUTHORITIES

Page No.

### CASES:

<i>Columbus v. Forest</i> (1987), 36 Ohio App.3d 169, 522 N.E.2d 52 .....	4
<i>State v. Combs</i> , 2004-Ohio-6574 .....	4
<i>United States v. Agurs</i> (1976), 427 U.S. 97, 112 .....	4
<i>United States v. Augenblick</i> , 393 U.S. 348, 355-356 (1969) .....	4

### CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution .....	2
Fourteenth Amendment, United States Constitution .....	2
Article I, Section 16, Ohio Constitution .....	2

## **STATEMENT OF THE CASE AND FACTS**

Amicus respectfully defers to the Statement of the Case and Statement of Facts as recited in the Merit and Reply Briefs of Defendant-Appellant and incorporates the same as if fully written here.

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Ohio Association of Criminal Defense Lawyers (OACDL) is a statewide association of over seven hundred (700) public defenders and private attorneys who practice primarily in the field of criminal defense. The Association was formed for charitable, educational, legislative and scientific purposes with the goal of advancing the interests of society and protecting the rights of citizens and other persons accused of crimes under the laws of the State of Ohio and the United States. The organization has an interest in protecting the integrity of the judicial system and ensuring fair and equal treatment under the law. The foregoing interest compels Amicus to support Defendant-Appellant in this matter.

## APPELLANT'S PROPOSITION OF LAW – MODIFIED

If the accused in a OVI / DUI case makes made a *specific* request for preservation and/or production of a *specific* videotape and the tape is destroyed or erased, the burden of proof shifts to the State to prove the evidence was not material and/or “potentially exculpatory.” If the State fails to meet its burden, the trial court must apply an appropriate remedy which can include dismissal of the case and dismissal is mandatory where no other remedy would provide an adequate remedy. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.

### I. The Conundrum

Your daughter is arrested and charged with driving under the influence of alcohol. She is generally pretty responsible and trustworthy. She tells you she was not driving while impaired and that she “did pretty well” on the field sobriety tests. You tend to believe her. Good news: You consult a lawyer who advises that the police agency involved always videotapes roadside investigations. You ask what can be done to ensure that the videotape is not destroyed or erased. The lawyer advises you that he will immediately send written notification to the prosecutor and police agency that the Defendant wants that videotape preserved. Your daughter’s counsel believes that under Ohio appellate court case law such actions should be enough to ensure that the State preserve the evidence or suffer sanctions. However, upon further consideration (and to quell your concerns) he advises you that he will also file a Motion to Preserve and seek a Court Order that the evidence be preserved.<sup>1</sup>

---

<sup>1</sup> Admittedly there was no Court Order to preserve in the instant case but under the State’s argument it would not seem matter -irrespective of what the accused did to try and ensure preservation if the video is destroyed or erased the State argues that burden is on the accused to show that it was intentionally destroyed (bad faith) or to prove the videotape would have been materially exculpatory.

Everyday attorneys throughout Ohio have such discussions with clients charged with driving under the influence and their loved ones. Currently, based upon the prevailing case law in the Ohio appellate courts, attorneys who are willing to take the necessary steps to specifically advise the State that there is a videotape that the accused wants preserved, those attorneys can assure their clients that the State will take all reasonable steps to ensure the videotape is preserved.

## **II      Oops**

Your daughter's counsel takes all these steps; he assures you that the prosecutor, police agency and arresting officer are all well aware that the accused wants the tape preserved and wants to review the tape. A few weeks later you are told that the videotape is not available for review or use in your daughter's defense. It seems that the VHS tape was originally secured but that it was given to an untrained to make a copy of the tape. You learn that the person told his superiors that he did not know how to work the machine used to make the copies and had never seen the instruction manual. You learn that another officer was supposed to supervise the untrained officer and show him how to do it properly but -obviously- did not do so. You are somewhat incensed to learn that this VHS tape, like all other VHS tape has a simple tab that can be removed which would prevent the tape from being erased. No one took that simple step. (See appendix 1 & 2.) Finally you learn that the police agency has a specific policy of maintaining and not destroying video tapes related to pending cases and/or where a request for a copy of the tape has been made. (Appendix 3.) Obviously the destruction of the video evidence violates this policy.

### III Bad Faith and Negligence

The instant Amicus is not convinced that any degree bad faith must be shown where a specific request for preservation and production of a specific item of clearly material evidence has been made. Indeed the Federal cases seem to indicate that in such instances the evidence need only be “potentially useful” and if it is no bad faith need be shown at all.<sup>2</sup>

Notwithstanding the above, Amicus believes that negligence or simple inaction can equate to or is tantamount bad faith. This is consistent with Ohio case law. The Court in the seminal case of *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 522 N.E.2d 52, held that the State’s failure to respond at all once it (admittedly) received a request to preserve tape recorded evidence is presumptively bad faith. See cases following *Forest* in the merit briefs of Appellant and the instant Amicus.) Interestingly even the appellate court’s that refuse to fully adopt the the “burden shifting” remedy adopted in *Forest* have arrived at a similar result. Thus while Appellee is correct that the Fifth Appellate District has not (fully) adopted the *Forest* analysis, that Court of Appeals applied the same sanction in *State v. Combs*, 2004-Ohio-6574. In *Combs*, as herein, the tape was erased by the arresting officer as he attempted to make a copy. In *Combs*, as here, the Officer was an Ohio Highway Patrol Officer and the appellate Court found that failure to take proper steps to preserve the tape, especially in light of the agencies written policy requiring preservation, was bad faith.

---

<sup>2</sup> “When the prosecutor receives a specific and relevant request, the failure to make any response, is seldom, if ever excusable.” *United States v. Agurs*, 427 U.S. 97, 106 (1976). When a request to produce or preserve is made by the defendant, the State must make an “earnest effort” to preserve the requested materials. See *United States v. Augenblick*, 393 U.S. 348, 355-356 (1969).

#### **IV Acts of God**

As noted in our merit brief, Amicus concedes that there may be a difference between loss or destruction of evidence that the State simply could not have prevented. That, however, is not the case here. Anyone remotely familiar with recording and maintaining video footage on VHS tapes knows that there is a small tab on the cassette that is put there so that one can remove it to “prevent accidental erasure.” (See Appendix 1 which is found in similar format in the container of all VHS tapes.)

#### **V. Exculpatory versus Potentially Useful Video Tape**

Perhaps the primary reason that Ohio appellate courts have ruled in favor of the accused in the majority of the cases is the reality that practically all videotapes made during the investigation of a OVI / DUI case are likely to have some exculpatory material on them. The only other evidence of what happen at the roadside is the officer’s report. Such reports do not document every single thing that happened during the ten minutes to sixty minutes that the officer and the accused are at the scene of the investigation / arrest. Except in the rare case (where the most egregious facts are alleged) attorneys and trial courts are bound to find some material on the video which either contradicts the officer in some way or adds details the officer did not note. In any event the Ohio intermediate appellate courts, and this Honorable Court in *State v Geeslin*, have acknowledged the unique nature of such roadside videos.

#### **VI Whether a Decision in Favor of the Accused would (or would not) result in the State preserving videos that should be preserved**

Amicus, Ohio Attorney General, argues that a ruling in favor of the accused would not result in any change of the policies, practices and care employed by police officers and police agencies in the future. Such an assertion is erroneous. Should this Honorable Court note that all the officer / agency in the instant case needed to do to avoid being placed in this position is to



pull the tab on the VHS tape the word will go out and there is no doubt that any agency that does not make it a absolute practice currently will do so *immediately*.

**Conclusion**

Amicus submits that this Honorable Court should remand this case to the trial court with instructions to consider whether the destruction of evidence in this case was so negligent that the burden should be shifted onto the State to show the videotape would not have been exculpatory.

Respectfully submitted,

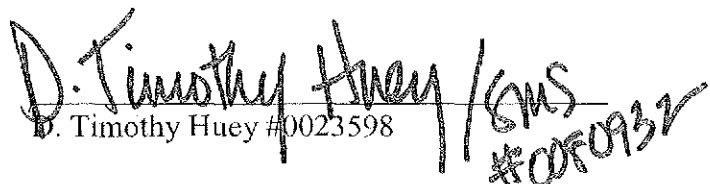
  
D. Timothy Huey #0023598  
(Counsel of Record)  
3240 Henderson Road  
Columbus, Ohio 43220  
(614) 487-8667; (614) 573-7232

Jeffrey C. Meadows #0067689  
Lyons & Lyons Co., LPA  
8310 Princeton-Glendale Rd.  
West Chester, Ohio 45069  
(513) 777-2222; (513) 870-5442 (fax)

Counsel for Amicus Curiae,  
Ohio Association of Criminal Defense Lawyers

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served by regular U.S. mail, this 25<sup>th</sup> day of August, 2009, upon the following to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750, and Benjamin Mizer, Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.

  
D. Timothy Huey #0023598

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL LUPARDUS,

Defendant-Appellant.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Case No. 2008-2487

On Appeal from the Washington  
County Court of Appeals  
Fourth Appellate District

Case No. 08 CA 31

---

**APPENDIX TO MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF APPELLANT MICHAEL LUPARDUS**

---



This VHS videocassette is designed for use exclusively with recorders that bear the VHS mark.

Cette cassette vidéo VHS est conçue pour être utilisée exclusivement avec les enregistreurs portant le signe "VHS".

#### PRECAUTIONS

- This videocassette is NOT usable on its reverse side.
- Do not handle the tape with your fingers or attempt to disassemble the cassette.
- Avoid subjecting the cassette to strong shocks.

#### PRECAUTIONS A PRENDRE

- Cette vidéocassette n'est pas utilisable inversée.
- Ne pas toucher la bande avec les doigts ni démonter la cassette.
- Ne pas soumettre la cassette à des chocs violents.

#### TO PROTECT RECORDING FROM ACCIDENTAL ERASURE

- To prevent accidental erasure, break off the breakout tab.
- To record again, cover the hole with tape.

#### PROTECTION CONTRE L'EFFACEMENT INVOLONTAIRE D'ENREGISTREMENTS

- Pour empêcher un effacement accidentel, briser l'ergot de sécurité.
- Pour enregistrer à nouveau, recouvrir la cavité au moyen d'un ruban adhésif.

#### MOISTURE CONDENSATION

When moisture condensation occurs (for instance, when the cassette is taken from cold outdoors into a heated room), wait until the cassette has warmed up to room temperature before using (about 2 hours). The tape may be damaged when used in a moistened condition.

#### CONDENSATION DE L'HUMIDITÉ

Si l'humidité de l'air se condense sur la bande magnétique, attendre (pendant environ 2 heures) que la cassette soit à la température de la pièce avant de s'en servir. La bande magnétique risque un endommagement certain si elle est utilisée dans des conditions de condensation d'humidité.

#### VIDEOCASSETTE PRODUCTS LIMITED WARRANTY FOR THE LIFE OF THE PRODUCT

Maxell warrants this product to be free from manufacturing defects in materials and workmanship for the lifetime of the product. This warranty does not apply to normal wear or to damage resulting from accident, abnormal use, misuse, abuse or neglect. Any defective product will be replaced at no charge if it is returned to an authorized Maxell dealer or to Maxell Corporation of America, P.O. Box 900, Fair Lawn, NJ 07410-0900. (In Canada, all returns should be sent to Maxell Canada, 50 Locke St. Unit #2, Concord, ON Canada L4K 5R4.) HOWEVER, MAXELL SHALL NOT BE LIABLE FOR ANY COMMERCIAL DAMAGES, WHETHER INCIDENTAL, CONSEQUENTIAL OR OTHERWISE, ARISING OUT OF THE USE OF, OR INABILITY TO USE, THIS PRODUCT. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. This warranty gives you specific legal rights, and you may also have other rights which vary from State to State.

#### GARANTIE LIMITÉE DES VIDÉOCASSETTES POUR LEUR DURÉE UTILE

Maxell garantit ce produit, pour toute sa durée utile, contre les vices de matières premières ou de fabrication. Cette garantie exclut l'usure normale et les dommages résultant d'un accident, d'une utilisation anormale de mésusage, d'abus ou de négligence. Tout produit défectueux sera remplacé sans frais s'il est retourné à un dépositaire Maxell agréé ou à Maxell Corporation of America, P.O. Box 900, Fair Lawn, NJ 07410-0900, É.-U. (Au Canada, tous les articles sera envoyer à Maxell Canada, 50 Locke St. Unit #2, Concord, ON Canada L4K 5R4.) CEPENDANT, MAXELL NE SERA TENUE RESPONSABLE D'AUCUN DOMMAGE COMMERCIAL, QU'IL SOIT ACCIDENTEL, INDIRECT OU AUTRE, OCCASIONNÉ PAR L'UTILISATION OU L'INCAPACITÉ D'UTILISATION DE CE PRODUIT. LÀ OU ELLE EST INTERDITE, L'EXCLUSION OU LA RESTRICTION DES DOMMAGES INDIRECTS NE S'APPLIQUE PAS. Cette garantie vous confère des droits juridiques précis. Vous pouvez avoir d'autres droits, variant selon la province.

Unauthorized recording of copyrighted television programs, video tapes, and other materials may infringe the right of copyright owner and be contrary to copyright laws. L'enregistrement non autorisé des programmes de télévision, des films, de bandes vidéo et de tout autre matériel peut être contraire aux droits de propriété littéraire et artistique des auteurs et constituer une infraction aux lois relatives aux droits de propriété artistique et littéraire.

PNE 060020-03

EXHIBIT

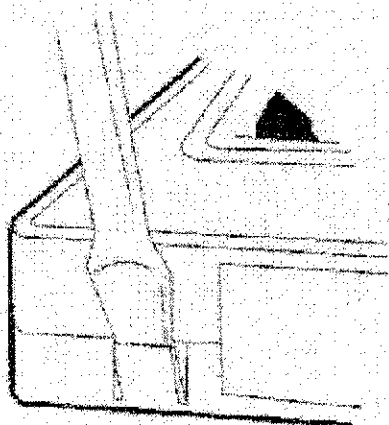
tabbles

## BASIC OPERATION (continued)

### ERASURE PROTECTION

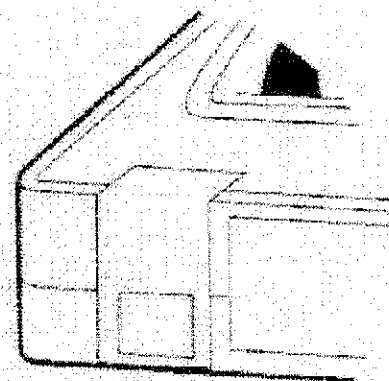
Video cassettes are equipped with a safety tab to prevent accidental erasure. When the tab is removed, recording cannot be performed.

- TO PREVENT ACCIDENTAL ERASURE



- After recording, break off the safety tab with a screwdriver if you don't want to record over the tape.

- TO RECORD AGAIN



- Cover the tab opening with cellophane tape.



**Ohio State Highway Patrol**  
**Policy Number : OSP-103.22**

**AUDIO/VIDEO MONITORING AND RECORDING, STORAGE,  
HANDLING, RELEASE, AND DESTRUCTION**

Date of Revision : **6/21/2007**

Priority Review : **All Sworn Officers ; Other Affected Employees**

Distribution : **All OSP Offices and Facilities**

**Summary of Revisions**

Material revisions throughout are in bold, italicized text.

Policy revised throughout to change the word "tape" to "media."

Policy, paragraph B.2.h, revised to remove the requirement to maintain a spare flash card in each vehicle.

Policy, paragraph D.3.c, sentence revised to read, "Erase and re-use erasable media after no less than 30 days and no more than 60 days."

Policy, paragraph E.3, revised to provide guidelines for storage and retention of recordings.

Attachment HP-12E, Digital Recording Log, added.

**Purpose**

To provide guidelines for use of Division audio/video recording equipment.

To provide guidelines for secure and uniform methods of recording, storing, releasing, and recycling audio/video recordings.

**Policy**

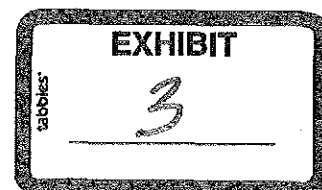
**A. USE OF FIXED, MOBILE, AND HANDHELD CAMERAS**

**1. Division Equipment** - Division-owned recording equipment should be used by employees. The use of personal or privately-owned **recording equipment** for documentation purposes should be avoided. Recordings generated on Division equipment are Division property.

**2. Division Facilities**

a. At Division facilities equipped with audio/video monitoring/recording equipment for the BAC Room and other locations, the equipment will be used for officer safety, post security, or as needed for other purposes.

b. It is the arresting officer's responsibility to ensure the audio is shut off if a suspect or arrestee is permitted to use an area for privileged conversation in person or by phone.



**3. General Usage** - Maximize the use of audio/video recording.

- **Aim and Focus** - Position and adjust where necessary to record events.
- **Monitor** - Ensure the audio/video equipment is not deactivated until the recorded contact is completed.
- **Wireless Microphone** - When available, use the wireless microphone to provide narration.

**4. Disclosure / Demands to Cease Recording** - Inform those who ask that audio/video recording equipment is in use. It is not Division policy that officers cease recording an event, situation, or circumstance solely at the demand of anyone other than the trooper or his/her supervisor.

**5. Exceptions to Recording** - Occasions and incidents will occur when an officer is unable to or does not activate the camera, or if already activated, must temporarily suspend recording. When exercising this discretion, an officer must be prepared to articulate his/her reasoning, and in the case of temporary suspension of a recording, the officer should declare on the recording the reason for suspension prior to deactivation. Situations when recordings might be inappropriate include but are not limited to:

- Protect the anonymity of an informant or other confidential source of information.
- Officer safety concerns.
- Administrative conversations.
- Conversations involving law enforcement sensitive information.

**6. Privileged Communications** - Privileged communications as defined by Ohio Revised Code 2317.02 shall not be monitored or recorded.

**B. IN-CAR CAMERAS <41.3.08a, 83.2.02> a-e****1. Operational Use**

a. It is expected that officers operating patrol vehicles equipped with functioning recording equipment record traffic stops, pursuits, and other public contacts occurring within the operating range of the camera. Back-up officers arriving to assist should make a reasonable effort to position audio/video equipment to record events. It is not expected that troopers record all crash investigations. Only evidence at the crash scene necessary for prosecution should be recorded.

b. Officers may also record other events, situations, and circumstances, including, but not limited to, armed encounters, acts of physical violence, felonious activity, and any evidence at a crash or criminal investigation that would be beneficial to have recorded on video.

c. In vehicles equipped with digital camera/DVR combinations, the DVR is programmed to automatically start recording, including a one-minute pre-record, whenever the emergency

lights and/or siren are activated.

d. To reduce audio interference during the recording of a traffic stop, pursuit, or incident, non-work-related audio equipment (e.g., AM/FM radio) should be turned off prior to activating audio/video recording equipment.

e. Except for patrol vehicles equipped for K-9 transport, the backseat microphone will default to the 'ON' position. The officer may manually deactivate it when necessary (e.g., privileged conversations).

## **2. Officer Responsibility - Inspection, Maintenance, and Repair**

a. Prior to each work shift ensure the audio/video equipment is functional, then notify the dispatcher for notation on the HP-53B or enter into computer if either functional or non-functional.

b. Audio/Video Recorder (tape) testing includes:

- Activating the belt microphone
- Making a brief audio recording (e.g., testing 1,2,3...)
- Rewinding and playing back recording on monitor to ensure audio/video components are operable.

c. Digital camera/DVR testing includes:

- 1) Logging on to the DVR using the Division-assigned USB flash drive and confirming the correct unit number appears on the monitor display.
- 2) Synchronizing the belt microphone with the video system by placing it in the carrier.
- 3) Making a brief audio recording (e.g., 1,2,3...)
- 4) Playing back the recording on the monitor to ensure audio/video components are operable.
- 5) If the NW (Night Watch) feature is available on the camera, use the NW04 setting at night.
- 6) If the vehicle is to be left on post at the end of the shift, log out of the DVR and confirm the unit number does not appear on the monitor display.

d. It is not necessary to take a vehicle out of service because of a non-functional camera, but the in-car video system will not be used until repaired.

e. Report equipment failure to a supervisor and arrange for repairs. Report equipment failure during a work shift to the dispatcher without delay, who will then record the malfunction on the HP-53B or enter into computer to ensure there is a

written record of the inability to use the audio/video recording equipment. Unless otherwise instructed, the equipment should remain in the patrol car. Report equipment failures involving the car (camera, DVR, etc.) to a DHQ electronic technician. Report equipment failures involving post equipment (servers, card readers, etc.) to LEADS Control for network administrator dispatch.

f. Maintain the in-car video system and perform routine maintenance in accordance with the manufacturer's instructions.

g. Replace videotape cassettes that show signs of wear or degraded images, and maintain a spare videotape in the vehicle.

h. When encountering vehicle or equipment maintenance issues that will require technical or maintenance staff to be engaged to troubleshoot and initiate repairs, the employee leaving or bringing the vehicle for repairs will ensure that any video **media** installed in the vehicle's recording system is removed and properly stored before taking the vehicle for service. This will include service performed by electronic technicians or network administrators.

i. Upon receiving a patrol vehicle equipped with a video recording system for repair, the ET or NA will check the video recorder to ensure the video **media** has been removed before power is disconnected or restored to the vehicle / video recorder.

### 3. Mobile Audio/Video Recording Checklist (See Attachment)

a. To continually improve overall operations, at least once a month each officer should review a video recording (randomly selected by a supervisor) with their immediate supervisor.

b. The training review checklist is for use by a supervisor while viewing a video recording with an officer, and may be destroyed after use.

c. Each week during Field Officer Training, the post commander will select and review with the Field Training Officer and the Trainee a recent recording.

4. **Demonstration Requests** - Division officers should exhibit, display, and demonstrate in-car cameras to interested parties on request, at a convenient time and place.

## C. USE OF PORTABLE / HAND-HELD VIDEO / DIGITAL RECORDING SYSTEMS <83.2.02>1&2

1. Portable, hand-held video/digital recording systems are useful in recording events and incidents. However, video/digital recordings should not be used to replace still photography when documenting investigations. Use still photography to document events for evidentiary purposes and process



in accordance with Division policy.

2. Minimize use of video/digital to document an unusual incident or incidents such as natural disasters, major investigations, catastrophic crash scenes, etc. Seal video/digital recordings in an HP-12B pouch and forward to the OSP Photo Lab without delay. Document incident number / crash number and the existence of the recording on the OH-2 and/or Incident Report. As a public record subject to disclosure, the recording will be filed in the Photo Lab and retained according to the applicable retention schedule.

**D. IDENTIFICATION AND STORAGE OF ALL RECORDED MEDIA <41.3.08b,c> 1-3**

1. **Responsibility** - Officers and other employees are responsible for:

- Ensuring audio/video recordings are not altered;
- Maintaining an adequate supply of recording media (videotape / free space on a flash card to complete a tour of duty; and
- Using only Division-issued audio/video recording media (flash cards, USB drives, etc.).

2. **Removal of Flash Cards** - The flash card should be electronically downloaded at the end of the shift.

3. **Removal, Identification and Storage of Videotapes** - Remove completely recorded tapes from the recorder.

a. **ID Label** - Place a label on the recording and document the following:

- Name of officer/employee responsible for generating the recording;
- Unit #, post #, and next sequential # assigned by the officer;
- First and last date the media was used; and
- If the media includes the recording of an event that is the subject of an incident or crash report, document the appropriate report number. Do not record arrest numbers.

b. **Storage** - Store used audio/video media not used as evidence in a locked storage area accessible only to post supervisors. Store audio/video media at the post of origin regardless of an officer's duty assignment change.

c. **Re-Use** - Prior to erasing a recording, ensure court proceedings are completed. This includes criminal and civil cases, with emphasis on potential federal or state asset forfeiture cases. When multiple agencies are involved in a joint operational detail (e.g., DEA, FBI, police, sheriff), contact each agency to ensure the recording will not be needed. Erase and re-use erasable media after **no less than 30 days and no more than 60 days**.

d. **Recording Erasures** - Record each erasure and re-use of

media on an ADM3504, Certificate of Records Disposal. Enter erasure of multiple media recordings as a single entry provided the inclusive dates are listed. Forward completed and signed ADM3504's to Strategic Services, Central Records through a supervisor in accordance with HP-ADM3504.

#### **E. RECORDINGS USED AS EVIDENCE <41.3.08b,c> 1-5**

**1. Processing** - Process recordings which may be used as evidence in accordance with Policy OSP-103.10, Storage and Disposition of Evidence / Recovered Property.

**2. Control** - Recordings used as evidence and potentially subject to continuing judicial review (e.g., appeals process) shall continue to be governed by the joint control of the Division and the affected prosecuting authority. Patrol facilities are provided with the necessary duplication equipment to permit maintaining the evidentiary chain.

**3. Storage** - Recordings used as evidence (e.g., under subpoena, request of prosecutor, etc.) shall be retained by the Division. ***Those recordings on the post video server shall be tagged. The recorded media shall be retained on the post server up to two years or until adjudication. When no longer needed by the court, remove the tag and it will be purged 60 days later. Untagged recordings on the post server will be retained for 60 days before being automatically purged. Tagged videos remaining on the server for two years will be purged automatically by the system. If they are still required, the video must be copied to a DVD prior to the two year deadline and that recording shall be handled as evidence.***

**4. Viewing** - Display of evidentiary recording contents shall be limited to Division employees and those specifically designated by the prosecutor. Display and/or duplication of video regarded as evidence shall be limited to Division employees, those specifically designated by the prosecutor, or a person authorized under court order.

**5. Exceptional Incidents** - Unusual or exceptional incidents related to law enforcement activities generate the interest of many. Employees shall not permit un-authorized persons the opportunity to review a video segment without prior authorization of the Superintendent or designee. If allowed, this could constitute pre-trial publicity and inhibit court proceedings.

#### **6. Challenges to the Evidentiary Value of Recordings**

a. Successful court challenges to the use or propriety of recorded evidence shall be detailed in writing by the officer's immediate supervisor and forwarded through DHQ to the Office of Field Operations.

b. The documentation should include a summary of the court's ruling as well as a notation and discussion of any restriction or sanction levied pursuant to the court ruling.

**F. USE OF RECORDINGS FOR PURPOSES OTHER THAN EVIDENCE** - Videos generated by the Division (other than those of an evidentiary nature) which are being retained in accordance with the 30-day provision are subject to public records law and Ohio Department of Public Safety policy DPS-400.04. Reproduction of videos generated by the Division without authorization of the Superintendent or designee is prohibited.

1. **Examples:** Video recordings may be saved for reasons other than evidence, including:

- officer safety review
- media requests
- public information
- training
- possible civil litigation
- to protect the officer from unfounded complaints, etc.

2. **Storage and Security** - Any video saved for legitimate law enforcement / administrative use should be stored in a secure area accessible only to authorized Division employees.

3. **Training Aids** - For recordings that may be of use as a training aid:

- a. A supervisor will view the video.
- b. If the video might be of value for training and is not needed as evidence, the supervisor should forward the copy of the video to Field Operations for review prior to sending it to the Academy.
- c. Academy staff will review and evaluate a video segment to determine its training value and reproduce it if needed.

**G. MEDIA / PUBLIC RECORDS REQUESTS** - Public support for Division operations is enhanced by the public viewing what we see each day. Release of audio/video segments for national and statewide media coverage improves public understanding of our mission and the obstacles we must overcome. Employees are encouraged to send video segments to the Public Affairs Unit (including those used in criminal cases when released by the prosecutor). Copying or reproduction of any video or video segment generated by the Division without authorization of the Superintendent or designee is prohibited. **WITHOUT EXCEPTION**, release of video to the media will only be done by the Public Affairs Unit with approval of the Superintendent or designee. Video segments of the following are examples likely to be released to state and national media:

- Crashes, if recorded
- Dangerous or reckless driving
- Unusual incidents
- Pursuits
- OVI arrests
- Anything which the officer believes is newsworthy and will portray the officer(s) and Division positively.

1. **Forward to the Public Affairs Unit** - Forward all requests for video segments without delay to the Public Affairs Unit. **WITHOUT EXCEPTION**, direct all media requests for recorded segments, except prosecutorial work

product, to the Public Affairs Unit.

**2. Request in Writing** - Encourage requesters (although not required) to send their request in writing by fax or email to the Public Affairs Unit.

a. Written requests should be on the letterhead of the requesting organization (if applicable) and indicate mailing address, reporter / producer / requester name, and requested method of how the recorded segment should be sent (FedEX, Airborne Express, UPS, etc.) along with applicable account number.

b. Information from the request is entered into a Public Affairs Unit database that includes at the least: the media organization's name; last name of reporter / producer / requester; date received; date sent; and description.

### **3. Duplication and Processing by Public Affairs**

a. **Digital Master** - All digitally-copied and network downloaded video segments will be archived in the Public Affairs Unit in a locked cabinet accessible only to authorized Strategic Services / Public Affairs Unit staff. Public Affairs will contact the facility for the original video, or to network download a digital copy of the original video. The Public Affairs Unit staff will document the request by recording on the HP-63B, Public Records Request Log.

b. **Digital Media (Network Downloaded)** - Public Affairs staff will complete a DPS duplication request and forward the video to the DPS video production studio. The network downloaded video will be archived in the Public Affairs Unit in a locked cabinet accessible only to authorized staff.

c. **Videotape** - A post supervisor may keep a copy of the recorded segment at the post but shall promptly send the original tape (unless stored as evidence) to the Public Affairs Unit. Public Affairs staff will complete a DPS duplication request and forward the original recorded segment, along with a digitally-mastered tape with available storage space, to the DPS video production studio. Videotapes sent to the Public Affairs Unit will be digitally copied and the original returned to the originating OSP office by the Public Affairs Unit for erasure and re-use.

d. **Digital Overlay of OSP Logo** - The Public Affairs Unit will ensure a digital overlay of the OSP logo is placed on the video. The use of the OSP trademarked logo is prohibited without the approval of a Public Affairs Unit supervisor or designee.

e. **Media Requests** - Public Affairs will forward the requested video segment to the media organization.

f. **All Other Video Requests** - The Public Affairs Unit will

forward the duplicated video segment to the Central Records Unit for mailing to the requestor.

**Standard References**

41.3.08

83.2.02

**Policy References**

<u>DPS-400.04</u>	ADMINISTRATION OF PUBLIC RECORDS REQUESTS
<u>OSP-102.01</u>	BACKGROUND AND SECURITY CLEARANCE INVESTIGATIONS
<u>OSP-103.06</u>	DIGITAL / FILM PHOTOGRAPHY TECHNIQUE, USE, AND RECORDKEEPING
<u>OSP-103.10</u>	STORAGE AND DISPOSITION OF EVIDENCE AND RECOVERED PROPERTY
<u>OSP-200.06</u>	PATROL CAR / MOTOR VEHICLE OPERATION BY SWORN OFFICERS
<u>OSP-403.06</u>	DIVISION ADMINISTRATIVE FILES, DIRECTIVES, FORMS, READ & SIGN
<u>OSP-403.22</u>	RECORDS MANAGEMENT
<u>OSP-500.10</u>	ANNUAL AND BIENNIAL INSPECTIONS - GHQ / DISTRICT / POST OPERATIONS (LINE AND STAFF)

**Attachment(s)**OSP-103.22 Mobile Audio-Video Recording Checklist.docOSP-103.22 HP-12E Digital Recording Log.doc