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The PROSECUTOR



— IN THIS ISSUE —

CONSIDERING THE IMPACT AND IMPLICATIONS OF BIRCHFIELD
ON INTOXICATED DRIVER PROSECUTIONS

LEAVE NO MAN (OR WOMAN) BEHIND: JUSTICE FOR VETERANS

FORFEITURE BY WRONGDOING: TURNING THE TABLES ON WITNESS INTIMIDATION

CROSS EXAMINATION OF EXPERTS PREPARATION PROJECT

PART II/BODY-WORN CAMERAS: PROSECUTOR-SPECIFIC CONSIDERATIONS

DOOR-TO-DOOR OPIOID OUTREACH IN PLYMOUTH COUNTY

DOCKET

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The PROSECUTOR

8

MESSAGE FROM THE PRESIDENT (2017–2018)

BY MICHAEL O. FREEMAN

9

CONSIDERING THE IMPACT AND IMPLICATIONS OF BIRCHFIELD ON INTOXICATED DRIVER PROSECUTIONS

BY PATRICK M. LEE

12

LEAVE NO MAN (OR WOMAN) BEHIND: JUSTICE FOR VETERANS

BY SEAN F. DALTON

14

FORFEITURE BY WRONGDOING: TURNING THE TABLES ON WITNESS INTIMIDATION

BY JOSHUA P. STEWARD AND DONALD P. GOODMAN, III

16

CROSS EXAMINATION OF EXPERTS PREPARATION PROJECT

BY TOM KIMBALL AND MELISSA SHEAR

18

PART TWO: BODY-WORN CAMERAS: PROSECUTOR-SPECIFIC CONSIDERATIONS

BY KRISTINE HAMANN

34

DOOR-TO-DOOR OPIOID OUTREACH IN PLYMOUTH COUNTY

BY TIMOTHY J. CRUZ

IN EVERY ISSUE

- 2 *On the Docket*
- 2 *Contact NDAA*
- 4 *Roster of Officers & Board Members*
- 6 *View from the Hill*

ABOUT THE COVER

The Onondaga County Courthouse's cornerstone was laid in 1904. The building opened to the public on the first day of 1907. The grand scale and intricate stonework typify this Beaux Arts building, a style popular for public buildings at the turn of the century. Also common is the projecting central portico, which faces Columbus Circle. Syracuse architects Archimedes Russell and Melvin King further dramatized the entry with a large copper dome and grand staircase. The central atrium, with marble columns and marble floors, is finished in dull gold and blues with ornamental plaster work and beveled glass. Four murals by William de Leftwich Dodge depict incidents in the lives of Minnehaha, Hiawatha, Pere LeMoyne and Asa Danforth. Three symbols of law and justice on murals at the head of the main marble staircase are the work of Gustave Gutgemon. Photo courtesy of the Downtown Committee of Syracuse.

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VIEW

From the Hill

By Nelson O. Bunn, Jr.
NDAA Director of Policy, Government & Legislative Affairs



NELSON O.
BUNN, JR.

CONGRESS PUNTED key funding decisions until December and has also been occupied with additional Administration nominations, fights over healthcare subsidies, and other world events.

As always, NDAA members are encouraged to contact Nelson Bunn on any policy or legislative issues that arise. He can be reached at nbunn@ndaajustice.org or at 703-519-1666.

Below is a snapshot of issues acted on since the last update to NDAA members:

APPROPRIATIONS

- The government is currently funded through December 8, 2017 under a Continuing Resolution. Congress also raised the debt ceiling until the 15th in order to have a broader discussion around government debt and other funding issues. A budget resolution was also recently passed to set up potential tax reform through a process known as reconciliation, allowing Republicans to push through a measure without any Democratic votes. Additional supplements around hurricane relief efforts may also be needed.
- Several amendments to the recent appropriations bills targeted the recent reset of policy by the Department of Justice around the asset forfeiture program. Those amendments restricted funding to implement the announcement by the AG to return to state adoptive forfeitures.

ASSET FORFEITURE

- This summer, Attorney General Sessions [issued a directive](#) related to federal adoptions through the asset forfeiture program, used by state and local law

enforcement across the country. The new guidelines reversed the previous memo from Attorney General Holder that eliminated state adoptive forfeitures except for a few public safety exceptions. While the new guidelines reinstated state adoptive forfeitures, it tightened the practice by requiring the development of additional training protocols, adding information to be submitted related to seizures including more information to demonstrate the establishment of probable cause for seizures, and established a \$10,000 seizure threshold where additional information may be required for the seizure to move forward.

DRUG POLICY

- On October 26, President Trump declared the nation's opioid crisis to be a public health emergency, allowing current resources to be redirected address the issue. Although he made the announcement, he did not request additional funding to take steps to reduce the crisis, nor did he declare it a national emergency, which would have different implications on federal resources and agency actions.
- NDAA continues to work with Congressional staff to

address potential gaps in dealing with the opioid crisis that were not addressed with the passage of the Comprehensive Addiction and Recovery Act (CARA). Congressional committees may revisit the overall opioid issue in 2018 as a second wave of efforts to tackle the issue.

ELECTRONIC COMMUNICATIONS

- On October 3, NDAA [issued a press release](#) on an amicus brief filed with the United States Supreme Court in the *Timothy Ivory Carpenter v. United States of America* case, which examines Fourth Amendment protections as they relate to cell site location information (CSLI). In the brief, NDAA argues that CSLI falls within well-established Supreme Court precedent holding that the Fourth Amendment does not protect information that is conveyed to a third party in order to obtain services or goods, including financial information in bank records, numbers dialed on a phone, and papers in the hands of tax accountants. For a copy of the full amicus brief, please contact Nelson Bunn at nbunn@ndaajustice.org.

FORENSIC SCIENCE

- On August 30, the National Institute of Standards and Technology (NIST) issued a notice for public comment on the future development of the Organization of Scientific Area Committees (OSACs). The OSACs were created in 2013 in an effort to strengthen forensic science across the country. NDAA's Forensics Working Group is reviewing the notice and will be submitting comments on the matter.
- On October 27, the Advisory Committee on the Federal Rules of Evidence held a symposium to discuss potential amendments and action to amend the Federal Rules of Evidence regarding whether or not forensic science testimony is admissible in federal cases. This is yet another step toward undermining the credibility of forensic science across numerous disciplines, which was also the goal of the President's Council of Advisors on Science and Technology (PCAST) and its report on forensic science evidence in court. NDAA is following the outcome of the symposium and plans to submit a letter on the issue.

HUMAN TRAFFICKING

- NDAA continues pushing for additional cosponsors for

the Stop Enabling Sex Traffickers Act of 2017 and the similar Allow States and Victims to Fight Online Sex Trafficking Act of 2017. These bills seek to hold websites like backpage.com accountable for the illicit trafficking they allow to occur through their site. NDAA [penned an op-ed](#), published in The Hill, urging lawmakers to pass the legislation without delay. NDAA continues to engage with staff in both chambers on additional language to garner more cosponsors and the possibility of a markup of the legislation in the near future to move the bill forward.

SENTENCING

- Recently, the bipartisan Sentencing Reform and Corrections Act (SRCA) was reintroduced in the Senate, aimed at a combination of front-end sentencing reform and back-end prison reform. NDAA supported the legislation at the end of last Congress, but is not weighing in at this time on the reintroduced bill as conversations are ongoing with congressional staff around potential changes that NDAA feels need to be made given the change in Administration and political environment.

MISCELLANEOUS

- NDAA recently [sent a letter](#) to the Federal Communications Commission urging the body to take up the issue of contraband cell phones in correctional facilities and the potential impact on public safety.
- NDAA has been invited by the Chairmen and Ranking Members of the House and Senate Judiciary Committees to brief staff on recently released [best practices](#) around prosecution of domestic violence cases, developed by NDAA's Women Prosecutors Section. In addition to briefing staff on that guide, NDAA will also provide comments on the upcoming reauthorization of the Violence Against Women Act (VAWA).
- NDAA's National Traffic Law Center recently released an [updated monograph](#) entitled "Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations, Second Edition."

Questions or feedback: Please contact Nelson Bunn at nbunn@ndaajustice.org or at 703-519-1666. For a list of the NDAA Legislative Committee members, please visit <http://www.ndaajustice.org/members/pdf/NDAA%20Committees-2016-2017-v7.pdf>.

MESSAGE

from the President (2017–2018)

MICHAEL O. FREEMAN



COUNTY ATTORNEY
HENNEPIN COUNTY
MINNESOTA

WHAT AN HONOR to be president of the National District Attorneys Association (NDAA) for 2017–2018. This is a tremendous organization with professional leaders whose friendship I value highly.

We got off to a good start with the summer Summit in my hometown of Minneapolis. More than 250 people came to town for the meetings and other events. Our theme of combating violence against women and their exploitation was timely and the event was highlighted by speeches by Senator Amy Klobuchar and Manhattan District Attorney Cy Vance.

It also is a pleasure to report that some of the management and financial challenges of the past few years have been met, much of it is due to the hard work of Treasurer Duffie Stone. We also will be selecting a permanent executive director in November at our New York meeting.

As I mentioned in my speech in Minneapolis and re-iterated other times, I have set three goals for the organization during my term. They are: organizational stability and enhancement; active membership recruiting; and expanded engagement in critical current issues and focused training.

Organizationally, we will improve when we select a permanent executive director, when we expand the

capacity of existing staff and hire additional staff. As to membership, we need to improve our recruitment of women and people of color for the board and as prosecutors. We also need to recruit leaders from large jurisdictions and immediately contact newly elected or appointed dis-

trict attorneys and share the benefits in being part of the NDAA family.

As for the expanded engagement in critical current issues and training, we need to continue our excellent basic training on 10 critical topics. We should expand issue presentations and discussions at our board meetings and explore critical and upcoming criminal justice issues and develop background papers about them. And we should develop strategies that our members can use.

I want to continue the practice of bringing in first-rate speakers for our board meetings. With that in mind, I also urge everyone to put on your calendars the Washington Capital Conference in late January and the Phoenix Board Meeting in March.

We are breaking through the barriers of the past and NDAA continues to be a positive voice for America's Prosecutors.

I have set three goals for the organization during my term. They are: organizational stability and enhancement; active membership recruiting; and expanded engagement in critical current issues and focused training.

Considering the Impact and Implications of Birchfield on Intoxicated Driver Prosecutions



BY PATRICK M. LEE

IN THEIR 2016 ANNUAL REPORT, MADD reported that Drunk Driving remains the number one cause of death on American roadways and causes an injury every two minutes.¹ But a new trend is emerging. According to a 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers, conducted by the National Highway and Safety Administration, 20% of weekend nighttime drivers tested positive for drugs in their system.² While drunk driving fatalities are slowly declining, drugged drivers are rapidly taking their place. In less than 10 years, the percentage of those drivers testing positive for THC in their system increased by 48% from a similarly conducted 2007 study.³

Criminal prosecutors across the country tackle impaired driving cases every day in the courtroom. Though these prosecutions can become routine due to volume, the DUI law is dynamic. It is our duty to know this law, to be able to apply the law to each case, and to safeguard the integrity of our prosecutions.

For many years, prosecutors and law enforcement officers have been able to rest comfortably on the legal fiction that implied consent is the same as voluntary consent. The U.S. Supreme Court has solidly disputed this fiction over the last several terms. In doing so, it has reminded us that a chemical test to determine alcohol or drug concentrations

in an impaired driver is a search under the Fourth Amendment, regardless of the label our legislatures place on it.

Though it may add time and burden to the State and in certain cases even jeopardize our ability to prosecute, we must face the Fourth Amendment and its implications in our DUI investigations. A law enforcement officer must either obtain a search warrant, or be able to clearly articulate an exception to the warrant requirement in order to obtain an impaired driver's bodily fluids. This article will analyze the law for each testing method as well as potential hurdles we face in the ever-changing world of DUI prosecutions.

BREATH TESTS

First, the good news! If your jurisdiction and/or agency relies on breath testing to determine alcohol concentration, you're in luck. In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the United States Supreme Court determined that a breath test was a search incident to arrest; therefore, a warrant was not required to either administer the test or criminalize a refusal to provide a valid breath sample. A breath test to determine the alcohol concentration of an impaired driver provides no new constitutional issues for prosecutors in the DUI context.

¹ Mothers Against Drunk Driving, "Report to the Nation" 2016.

² Berning, A., Compton, R., & Wochinger, K. (2015, February). Results of the 2013-2014 National Roadside Survey of alcohol and drug use by drivers. (Traffic Safety Facts Research Note. Report No. DOT HS 812 118). Washington D.C.: National Highway Traffic Safety Administration.

³ Berning, A., Compton, R., & Wochinger, K. (2015, February). Results of the 2013-2014 National Roadside Survey of alcohol and drug use by drivers. (Traffic Safety Facts Research Note. Report No. DOT HS 812 118). Washington D.C.: National Highway Traffic Safety Administration.

Patrick M. Lee is Deputy County Attorney for Buffalo County, Nebraska.

BLOOD TESTS

For those relying on blood testing for drunk or drugged driving prosecutions, the landscape has become more complicated since the Supreme Court's ruling in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). In *McNeely* the Supreme Court determined that a search of a potentially impaired driver was not a per se exigent circumstance authorizing a warrantless search, despite the well-known scientific evidence relating to the dissipation of alcohol concentration in a subject's blood over time. Though science and the law conflict in the Court's ruling in *McNeely* it provided a preview for the Court's changing analysis of warrant exceptions.

This changing landscape has been most notably confirmed by the Supreme Court in the *Birchfield* decision. In *Birchfield*, the Court determined that due to a blood test's invasive nature, a blood test to determine alcohol or drug concentrations was not a search incident to arrest and, therefore could not be compelled or criminalized without a warrant or exigent circumstances.

With "exigent circumstances" and "search incident to arrest" no longer options, most of us who prosecute in blood-testing jurisdictions were forced to make rapid adaptations in how we prosecute and advise law enforcement on this cases. It is, whether cost-effective and expedient or not, the reality that obtaining a search warrant is now the gold standard for addressing the Fourth Amendment as it relates to blood testing...unless we are fortunate enough to read what is every prosecutor's favorite line in a police report: "The Defendant consented to the search."

Even consent, however, has been qualified by the *Birchfield* Court. It must now be actual consent, and not "implied consent." *Birchfield* cautions us that consent cannot voluntarily be given under the Fourth Amendment "on pain of committing a criminal offense." *Birchfield*, 136 S.Ct. at 2186. With the removal of implied consent as a safe legal default, prosecutors must instead analyze whether the totality of the circumstances indicates voluntary consent.

Prosecutors, and Courts, should carefully review the facts of each case in order to determine if voluntary consent was obtained. A court will need to look to the totality of the circumstances to make this determination. See *Schneekloth v. Bustamonte*, 93 S.Ct. 2041 (1973). Some factors to consider in determining if consent was voluntary are:

- Individual's knowledge of Constitutional rights and right to refuse consent to the search (for example, an individual's prior conviction for refusal to submit to a chemical

test helps to illustrate the voluntariness of consent in the present case);

- Individual's age, intelligence, education, and language ability;
- Individual's overall cooperation with law enforcement prior to providing blood sample;
- Length of detention, nature of questioning and physical deprivations of individual prior to search;
- Response to request for the blood sample by law enforcement including any actions or statements that could be perceived to manifest a desire to refuse to allow the search or a withdrawal of consent for the search;
- Any statements or actions by the individual showing voluntariness of consent.

Following *Birchfield*, obtaining an admissible chemical blood test to determine alcohol or drug concentrations requires one of three scenarios. First, and easiest, voluntary consent may be obtained. Second, if obtaining consent is unsuccessful or impossible, a search warrant may be obtained for the sample. Finally, if neither voluntary consent nor a search warrant are possible, facts should be reviewed to determine whether exigent circumstances exist justifying a warrantless search⁴.

It is important for prosecutors to remember that a search warrant is not constitutionally required for every blood sample. A warrant need only be obtained in circumstances where the subject denies consent or is incapacitated or otherwise unable to provide voluntary consent.

URINE TESTS

Finally, for those jurisdictions that rely on urine testing for either drug or alcohol impaired drivers, the legal landscape remains unsettled as a result of the *Birchfield* Court's avoidance of the issue.

In the context of drugged drivers, with the exception of our counterparts who can rely on blood or oral fluid testing, urine testing can be a compelling component of a DUI-drug prosecution. Namely, a strong DUI-D case will rely on the use of a Drug Recognition Expert (DRE), who must obtain a toxicology sample to complete their DRE evaluation.

In determining the best practice for legal admissibility, urine remains unclear. Urine tests were specifically not analyzed by the Supreme Court under the search incident to arrest warrant exception. Given the growing problem of drugged driving and the proliferation of the legalization of marijuana, the *Birchfield* Court's silence on the application

⁴ *McNeely* did not eliminate the possibility of exigent circumstances justifying a warrantless search of an impaired driver for a blood sample to determine alcohol or drug concentrations, *McNeely* only declined to adopt a per se determination of exigent circumstances relating to blood samples in the DUI context. A case-by-case analysis is necessary to determine if exigent circumstances exist.

of the search incident to arrest warrant exception relating to urine tests is deafening.

For prosecutors, it is important to focus on what *Birchfield* did say. In *Birchfield*, Court balanced, “on the one hand, the degree to which [the chemical test] intrud[ed]

Even consent, however, has been qualified by the Birchfield Court. It must now be actual consent, and not “implied consent.”

upon an individual’s privacy and, on the other, the degree to which [the chemical test is] needed for the promotion of legitimate governmental interests.” *Id.* at 2184-85.

The underlying premise of the *Birchfield* Court’s holding is that there is a legitimate governmental interest in obtaining evidence for use in DUI prosecutions as a search incident to arrest that outweighs an individual’s privacy concerns. Fundamentally, the Court’s determination that a breath test fits into the search incident to arrest exception while a blood test does not, relied on the intrusiveness of the available testing to obtain the same type of evidence necessary for the government’s legitimate interest of prosecution of impaired drivers.

Analytically, the ultimate application of the search incident to arrest warrant exception relating to urine tests is likely dependent on two factors: 1) Whether the urine is being tested for alcohol or drug concentrations; and 2) If there is any other statutorily prescribed testing method in the jurisdiction.

For example, urine which is being tested to determine alcohol concentration would not fit into the search incident to arrest warrant exception given the availability of a legally acceptable means of testing that is less intrusive in every state (i.e. chemical breath testing). The Minnesota Supreme Court reached this conclusion relating to urine tests to determine alcohol concentration in *State v. Thompson*, 886 N.W.2d 224 (2016), holding that a urine test in this context did not fit within the search incident to arrest warrant exception.

The *Thompson* Court held that “despite the State’s ‘great’

need for alcohol concentration testing, the availability of a less-invasive breath test weighs against the reasonableness of requiring the more revealing and embarrassing urine test absent a warrant or exigent circumstances.” *Id.* at 233.

On the other hand, in jurisdictions where urine testing is the only statutorily prescribed method for use in drugged driving cases, under the premise and holding of *Birchfield*, a urine test in this context should fit into the search incident to arrest warrant exception since it is the only (therefore, least intrusive) option available to serve the legitimate government interest.

Though the *Birchfield* balancing test is clear on its face, some courts may too narrowly apply the prescribed test. For example, in the author’s opinion, the North Dakota Supreme Court’s application of the balancing test analysis provided in *Birchfield* was too narrowly applied in a recent decision. In *State v. Helm*, 2017 ND 207, 2017 WL 3710938 (August 29, 2017), the North Dakota Supreme Court determined that a urine sample for use in a drugged driving prosecution did not fit into the search incident to arrest exception (despite no less intrusive test being available) because of the potential embarrassment of urination in front of law enforcement and the “potential abuse raised by the preservation of a urine sample and the wide range of information that law enforcement can extract from the sample.” The North Dakota Supreme Court’s analysis and overly narrow application of the balancing test completely disregarded both *Birchfield’s* and *Thompson’s* fundamental legal premise that the balancing test to apply the search incident to arrest warrant exception is resolved in favor of the least intrusive means of chemical testing available.

Other jurisdictions should find more success in applying the clear guidance of *Birchfield*. In states where there is no other chemical test available to the State for prosecution of drugged-impaired drivers the search incident to arrest warrant exception should be argued to apply to urine tests to determine drug concentrations in impaired drivers. Prosecutors should argue for the application of the *Birchfield* balancing test and should remind their courts of the compelling governmental interest and lack of other alternatives.

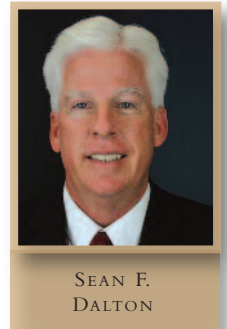
CONCLUSION

With the impaired driver tallying a significant portion of every jurisdiction’s caseload, it is important to analyze the admissibility of evidence following new interpretations by other courts of *Birchfield* in this dynamic area of law. Regardless of the chemical test utilized in your jurisdiction to prosecute the impaired driver, the path for admissibility is straightforward under the Fourth Amendment.

The PROSECUTOR

Leave No Man (or Woman) Behind: Justice for Veterans

BY SEAN F. DALTON



ONE OF OUR NATION'S most important military cre-dos is leave no man behind. This doctrine is part of the U.S. Soldier's Creed which powerfully but simply states, "I will never leave a fallen comrade." It is a promise that soldiers make to each other. While the mission is paramount, each soldier is part of a team and knows when someone is injured, captured or killed, everything humanly possible will be done to bring them back.

However, when Veterans come back home, all too often their service is ignored as they attempt to make a dramatic and sometimes overwhelming transition into civilian life. Many civilians cannot comprehend what soldiers have endured and unless they see a missing arm or leg, cannot understand the scars our returning vets will carry with them for the rest of their lives.

The problems confronting returning veterans have been well documented. Depression, post-traumatic stress disorder, traumatic brain injury, addiction issues, alcoholism and marital problems are just the tip of the iceberg. A Department of Veterans Affairs study reported the number of veteran deaths by suicide averaged 22 per day.¹ What role can law enforcement play in assisting troubled veterans?

PROSECUTOR'S ROLE

Invariably, some returning veterans will get in trouble with the law when reintegration into society goes poorly. Police respond to a variety of calls for service involving veterans ranging from a simple wellness check to serious assaults. How these matters are handled reflect upon your office and go well beyond arrest and conviction. As with

many decisions prosecutors make, these incidents are an opportunity to engage in restorative justice and provide guidance, services and support for troubled vets who have honorably served our country.

In 2014, the Gloucester County (NJ) Prosecutor's Office expanded its veterans program and created the Gloucester County Veterans Initiative (GCVI) to address the challenge of returning veterans becoming entangled in our criminal justice system. The goals of the GCVI are to reduce veteran contact with law enforcement, reduce the number of incarcerated veterans, increase services and support for veterans while maintaining public safety.

And, of course, accomplish the above with no additional cost to the taxpayers.

MANY PLAYERS, ONE TEAM: A COLLABORATIVE APPROACH

In May 2014, a Memorandum of Agreement (MOA) was executed between the Gloucester County Prosecutor's Office and several public and private agencies establishing the GCVI. Signees include representatives from county corrections, the police chiefs association, the state parole board, Catholic Charities, county veteran's affairs in addition to the prosecutor's office. Other participants in the program are mental health providers, the local office of the New Jersey Department of Labor, Human Services, county communications, Volunteers of America, local hospitals, treatment facilities and the Veterans Administration.

Each partner plays an important role in ensuring the goals of the GCVI are met. The GCVI utilizes a multidisciplinary approach to identify and address every veteran's problems. While the VA provides many services, access to

¹ <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2807>

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mental health treatment, counseling, addiction services, and housing can be provided in a timely manner through the GCVI. While not all services will be needed, these are reoccurring issues which need to be addressed for the veteran to be successful in completing the program.

Every team needs a leader and under our program it's the GCVI Coordinator. The Coordinator acts as the liaison between law enforcement, prosecutors and service providers. Importantly, many agencies have officers with military backgrounds who are well suited to serve in this capacity. The Coordinator must have excellent communication skills to ensure all partners understand and meet the expectations of the partnership.

LAW ENFORCEMENT TRAINING

In order for the program to be successful, veterans need to be identified as early as possible in the criminal justice procedure. Before the MOA was signed, six months was spent training the 600 sworn local law enforcement officers in the county on the GCVI. These officers from 23 different law enforcement agencies have primary patrol responsibilities and have first contact with veterans. Local officers are on the front lines in referring veterans to the program.

Training consisted of familiarizing officers with the program including the application process. Veterans do not need to be arrested to be eligible for the program and many were referred simply to assist them in obtaining services or support. The application was downloaded to the MDTs in the police vehicle so the officer could fill out the form and email the application to the GCVI Coordinator². Importantly, officers were also taught de-escalation techniques to avoid physical confrontations with veterans trained in hand to hand combat. Central communications/dispatchers were also trained and prompted the officers to inquire regarding the veteran status of arrestees.

VET TO VET

Often times, veterans have difficulty admitting they need help. They have been trained to be self-sufficient and overcome obstacles. When they are unable to do so, it can result in stress and frustration compounding alcohol, drug or other problems. As a result, community members who served in the military were identified to act as volunteer mentors. Similar to "Cop to Cop" programs, veterans are more willing to open up to someone of a similar age who has had similar military experiences. Mentors also assist in accompanying veterans to court, doctor appointments and counseling sessions.

CASE SCREENING

In many cases, a prosecutor has wide discretion as to what is an appropriate plea offer taking into consideration the position of the victim among other factors. An Assistant Prosecutor in our Grand Jury unit is assigned to screen all cases involving GCVI participants. A victim/witness advocate will ascertain the position of the victim and relay the same to the Assistant Prosecutor and GCVI Coordinator. The Assistant Prosecutor will be kept apprised as to any services or treatment they are receiving and where appropriate, make them a condition of the final disposition.

Under our GCVI program, almost one third of the GCVI participants had their charges downgraded, entered a diversionary program or had their charges dismissed. There has been very little recidivism among this population. The balance of GCVI participants were assisted with coordinating services with service providers and provided support as they addressed their issues.

STATEWIDE IMPLEMENTATION

On May 1, 2017, Governor Chris Christie signed into law bipartisan legislation creating the Veterans Diversion Program.³ Effective December 1, 2017, this law provides for statewide implementation in each of the 21 counties in New Jersey. The key components: collaboration among federal and state Veterans' Affairs offices as well as county and local agencies to create a point of entry for treatment; facilitate law enforcement diversion or referral of eligible veterans, and prosecutor oversight.

CONCLUSION

A District Attorney's office provides an excellent platform and opportunity to implement a veterans program within your criminal justice system. An effective diversionary program can be implemented using existing resources and personnel within your office. Law enforcement recognizes the value and embraces its role in helping veterans turn around their lives. Service providers are motivated to be part of a program to assist this important segment of our population.

Most importantly, this program will help save lives and strengthen our communities. It reinforces and allows us to honor the promise our soldiers made to each other—to leave no one behind.

² <http://www.co.gloucester.nj.us/depts/p/prosoffice/comservices/gcvi.asp>

³ <http://nj.gov/governor/news/news/552017/approved/20170511b.html>

The PROSECUTOR

Forfeiture by Wrongdoing: Turning the Tables on Witness Intimidation

BY JOSHUA P. STEWARD AND DONALD P. GOODMAN, III

WITNESS INTIMIDATION, once just a common trope in mob movies, made the jump from Hollywood to the courtroom with the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Prior to *Crawford*, a prosecutor could admit hearsay evidence against a defendant, without ever putting the declarant on the stand, so long as that evidence either fell "within a firmly rooted hearsay exception or [bore] particularized guarantees of trustworthiness." In overturning *Crawford*'s conviction, the Supreme Court breathed new life into the Constitution's guarantee that every defendant shall have the right to confront the witnesses against him. Post-*Crawford*, this means that a defendant must have a meaningful right to cross-examine the witnesses in his case. What most now agree is a correct interpretation of the Confrontation Clause became, unfortunately, an ace up the sleeve for many defendants.

When the evidence is against him and conviction seems a certainty, a less-than-honest defendant merely needs to ensure that the complaining witness recants, "forgets", or doesn't show up to court at all. This is especially problematic in cases involving a particularly vulnerable victim, such as a child or battered spouse. In domestic cases, we prosecutors will never have the access to or influence over the victim that the defendant has spent years cultivating. So what are we to do when the defendant turns the rules of the justice system against justice itself?

Fortunately, the *Crawford* Court, while empowering some supremely dishonest defendants, provided them with the rope to hang themselves. Tucked into the Court's analysis is an acknowledgment that forfeiture by wrongdoing is

a valid doctrine that "extinguishes confrontation claims on essentially equitable grounds." Four years later, in *Giles v. California*, 554 U.S. 353 (2008), the Supreme Court went further and acknowledged that forfeiture by wrongdoing does not merely extinguish confrontation arguments; it serves as an exception to the rule against hearsay.

SO WHAT IS FORFEITURE BY WRONGDOING?

Rule 804(b)(6) of the Federal Rules of Evidence practically defines forfeiture by wrongdoing as a "statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result." Many states' rules of evidence closely mirror the federal rules, but not all include such an explicit definition and hearsay exception. In those states, a prosecutor must ground himself in the case law, some of it nearly as old as the common law itself.

Historically Recognized

Forfeiture by wrongdoing first began appearing in England as an understood and accepted exception to the rule against hearsay as early as 1666 in *Lord Morley's Case*. After the Revolutionary War and the adoption of the Constitution, U.S. courts have continued to acknowledge and utilize this doctrine. In applying forfeiture by wrongdoing in *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court held that "[forfeiture by wrongdoing] has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." The doctrine was then

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regularly used in both state and federal prosecutions until it became essentially mooted by the Supreme Court's redefinition of the right of confrontation in *Ohio v. Roberts*, 448 U.S. 56 (1980). The reaffirmation of the doctrine, however, by the *Crawford* and *Giles* Courts definitively proves that forfeiture by wrongdoing has always been a valid legal theory.

When Does It Apply?

A straightforward reading of both *Crawford* and *Giles* reveals that three things must be true before forfeiture by wrongdoing can apply: 1) the declarant must be unavailable to testify; 2) the declarant's unavailability must be a result of the defendant's actions, and; 3) the defendant's actions must have been undertaken with the intent to produce the declarant's unavailability. The doctrine really could not be more simple. The difficulty is not in understanding what the doctrine is but in proving its applicability to a specific case.

When is a Declarant Unavailable?

Availability means more than physical presence on the witness stand. The relevant question is whether the declarant can actually be examined at trial. In most, if not all, jurisdictions, unavailability extends to situations in which the declarant is dead, too ill to testify, insane, absent and unable to be deposed or subpoenaed, unable to be located, protected by a privilege (such as the spousal privilege or the privilege against self-incrimination), or unable to remember (either a genuine or feigned lack of memory). This list is hardly exhaustive, and an argument could be made that situations in which the declarant testifies and provably lies about relevant facts also equal unavailability. Unavailability is about less than the declarant's geographic location and more about whether the prosecution and the court have reasonable access to the declarant's honest testimony.

So How Do We Prove It?

Proving a forfeiture by wrongdoing can sometimes be one of the easier things a prosecutor will do. The Supreme Court in *Davis v. Washington*, 547 U.S. 813 (2006), laid out the general framework for proving a forfeiture case. First, all elements need only be proved by a preponderance of the evidence. Second, the *Davis* Court held that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered" when determining if the doctrine applies. The only thing to do then is find the evidence. Excellent sources of forfeiture evidence are recorded jail phone calls, letters from jail, prior police reports involv-

ing the same parties, victim interviews, observations of other friends or family, counselors/psychiatrists, medical records, and phone records.

Of significant note, the Supreme Court, in *Giles*, recognized the extreme vulnerability of a battered family member and held that forfeiture by wrongdoing would often apply to situations of ongoing domestic assault. If the defendant has intentionally engaged in a pattern of behavior designed to isolate the victim from help (whether it be from the state or friends or family), that is strong evidence of an intent to prevent her testimony. Prior acts of abuse are even admissible to prove this situation.

So You Proved a Forfeiture by Wrongdoing, so What?

The power of this doctrine is that it can turn an unwinnable case into one that is nearly unlosable. The first advantage is obviously that *any* hearsay statement of the declarant becomes admissible for the truth of the matter it asserts. Second, this ability only goes one way. Since the defendant caused the declarant's unavailability, he cannot then benefit by it in order to offer hearsay from the same declarant. Third, most jurisdictions also allow a prosecutor to introduce the reasons why a particular declarant is not testifying, because any attempt by the defendant to unlawfully influence witness testimony is relevant evidence of the defendant's own knowledge of his guilt.

Perhaps the best advantage this doctrine provides (other than the admissibility of evidence) is that an unavailable declarant is nearly impossible to impeach. In most jurisdictions, a party may not impeach a witness by evidence of a criminal conviction, prior inconsistent statements, or adjudicated perjury unless the witness is actually called to testify, confronted with impeaching information, and provided an opportunity to explain the situation. Further, most jurisdictions do not allow a party to impeach its own witness or to call a witness solely for the purposing of impeachment, so a defendant could not simply call the unavailable declarant himself to get in the impeaching evidence. Many cases with unsympathetic or unpredictable witnesses can actually be stronger, therefore, if the witness is made unavailable by the defendant's actions.

A prosecutor's job can be a truly maddening experience in the best of times. But when the only thing standing between acquittal and justice is a defendant's continued malfeasance, the process can be unbearable. Fortunately, when the Confrontation Clause is tempered by the doctrine of forfeiture by wrongdoing, a nefarious defendant is provided with just enough rope to hang himself.

The PROSECUTOR

Cross Examination of Experts Preparation Project

BY TOM KIMBALL AND MELISSA SHEAR

IT IS NO FICTION that prosecutors notoriously maintain voluminous caseloads and investigate, prepare, and ultimately present their cases with little to no resources. In many jurisdictions, there might only be a few prosecutors in the county that are literally “sinking or swimming.” That reality is no more prevalent than in the impaired driving arena. Certainly all criminal defendants have a lot to lose when faced with the prospect of conviction and incarceration. But unlike offenders who commit other crimes, many defendants charged with driving under the influence have never been involved in the criminal justice system, maintain full time jobs, have stable families, hold ties to their community, and have the financial resources to hire defense attorneys with specialized expertise in this field. They have a lot to lose and will spend resources to try to undermine the State’s case.

Prosecutors by nature are planners. From the time we receive the arrest materials and decide to bring charges we consider how the case will ultimately play out if it were to proceed to trial. We are guided by our ethical rules, such as the American Bar Association’s Rule 3.8(a) entitled “Special Responsibilities of a Prosecutor” which requires that prosecutors refrain from prosecuting a charge he/she knows is not supported by probable cause. To maintain that obligation prosecutors take courses to learn about impaired driving detection, field sobriety tests, breath, blood, urine and oral fluid toxicology testing and results. Prosecutors review video evidence and other evidentiary materials, they study the relevant statutes and case law to support the charges and their theory of the case. At trial, prosecutors are well prepared for direct examination of government witnesses. But what do we do when faced with a novel defense theory or a defense expert hired to discredit the government’s case? We’re less prepared. And that’s a scary notion for many.

In 2009, Tom Kimball, proposed a concept to the Traffic Safety Committee of the National Association of Prosecuting Coordinators (NAPC). The idea was born during his experience

as a Tennessee Traffic Safety Resource Prosecutor (TSRP), where he attempted to help prosecutors prepare for jury trials that included defense experts. In his role, he gathered transcripts and did research concerning prior statements of the expert, often combing through large boxes of transcripts at any given time. When a prosecutor was given notice of an expert, it was within days of the trial. His help would be requested and his office delivered reams of paper, leaving little time to read and understand prior testimony to prepare for cross examination.

NAPC accepted the proposed idea and it was ultimately funded by the National Highway Traffic Safety Administration (NHTSA). The concept became an ongoing project. It permits TSRPs to gather twice a year to read, outline and prepare materials that could be sent to prosecutors with traffic cases when needed. The outlines included the name of the defense expert and the variety of topics of claimed expertise.

The need for the work was obvious. An example presented to the committee was of one expert who testified in three different states that a particular breath testing instrument was the best. The instrument changed depending on the state. It was always an instrument used in a different state than where he sat on a witness stand that day.

In our busy world of prosecution, most traffic crimes are in misdemeanor court. The prosecutors in those courts have no time to research and obtain transcripts from another county, much less another state. That permitted experts to run wild and make claims that were not consistent to benefit their clients.

As TSRP’s gathered information, it became clear that some experts were very careful to speak the truth and some were not. One of the experts researched as part of the project was later convicted of multiple counts of perjury. Others had been disallowed from testifying. Many have become more careful as they discover that prosecutors know what they have sworn to in past trials.

Transcripts, opinion letters, expert reports, articles, CVs, web-

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site materials, advertisements for services and more are collected. The materials are later developed into an outline that permits prosecutors to hyperlink to the page of the transcript from which the information was gathered. A typical outline begins with:

■ **Expert Background:** This section summarizes how the expert testifies about qualifications. TSRPs gather all CVs, bios, website materials and more to gather everything the expert has claimed about qualifications. It is not unusual for some experts to try to testify outside the scope of their knowledge and expertise, but the analysis occurs later. At the project meeting, TSRP’s gather information.

■ **Expert limitations:** At this level, the TSRP lists any court findings in which an expert was excluded from testimony. At times, judges can say some interesting things about the expert. A judge in one particular case stated, (Dr.)’s “idiosyncratic theories have been uniformly rejected and in addition it turns out that the curriculum vitae which he submitted to the court contained the false representation that he is licensed by the DEA to conduct tests on controlled substances.”

■ **Specific topic areas:** The TSRP finds cuts and pastes testimony about a specific area into separate sections to permit the prosecutor to quickly find past testimony. A typical index may appear in the finished product as:

Within any sub-folder will appear content that gives a hyperlink to the content. For example, in a sub-folder for the Tyndall effect and breath testing:

Table of Contents

Expert’s Background	2
Qualifications — Limitations/Shortcomings/Setups/Etc.....	3
BiA — Always works for the defense/paid by them/ etc.....	5
Tyndall Effect and Breath Testing	6
Blood in Mouth	7
Breath Testing	8
Breath Test-GERD	9
Alcohol on the Breath	10
HGN-Maximum Deviation.....	12
No Onset Prior to 45 Degrees.....	13
Nystagmus Generally.....	14
SFST Generally.....	15

Expert admits knowledge of 2002 article by Wigmore and Wilkie titled, “A simulation of the effects of blood in the mouth on breath alcohol concentration of drinking subjects”. This admission is then linked to the page and line in which the author admitted his knowledge. This knowledge permits the prosecutor to cross examine about the article.

Another example:

- Testified in Illinois on March 13, 2006 that there are 38 types of nystagmus.

- Testified in Iowa on August 14, 2008 that there are 144 types of nystagmus.
- Testified in Hawaii in 2009 that aside from Horizontal Gaze Nystagmus, that there has been 137 types of nystagmus.

Each of the statements is supported with a link to the testimony.

As TSRPs gather information, they read one transcript at a time. They would not necessarily read the three cases back to back. They often don’t know what they have uncovered at the time.

The job of putting all the materials gathered by the TSRPs into useful forms is performed by attorneys at the National Traffic Law Center (NTLC). Staff attorney, Sam Pellegrino has taken the lead on this process for the last year. Our attorneys make sure all the statements are in the correct categories so we can list the statements one after the other. It is during this process that conflicts like the nystagmus example above are discovered. As each summary is completed, it is returned to the TSRP who gathered the material to show that person what he/she accomplished.

The materials then become part of the NDAA/NTLC technical advisory response materials. Prosecutors get access to the materials by requesting information from their TSRP or directly from the NTLC. If a NTLC attorney responds to a technical request about a particular expert, that attorney responds with outline materials and a link to all the material that has been gathered. The NTLC attorney copies the state TSRP, so that both the NTLC attorney and TSRP can assist the prosecutor with any questions. Often, we let the prosecutor know which TSRP worked on gathering the material as that TSRP gained a working knowledge and formed impressions of the expert during the process.

To help more prosecutors, TSRPs from across the country met for three days in August, 2017 at NDAA headquarters. The group included: Moses Garcia (Washington State), Melissa Shear (Washington, DC), Scot Maddox (Maine), Ashley Schluck (Wyoming), David Drumheller (Pennsylvania), Bill Lindsey (Alabama), Jeff Sifers (Oklahoma), Barry Williams (Tennessee), Jason Samuels (Georgia), Scott Chase (New Hampshire), Ramsey Ross (Hawaii), Kate Wagner (California), and Ken Stecker (Michigan), along with Forensic Toxicologist Chip Walls (Florida). The group read, and dissected materials, transcripts, peer reviewed articles, motions, and case law to develop outlines to support prosecutors when cross examining a defense expert witness.

This was the 15th meeting of the project. The work can be grueling. It takes great concentration and it is rare that prosecutors spend so many consecutive hours in study hall after law school. It has been beneficial to bring TSRPs together to conduct this work. They are able to help each other, concentrate for long periods of time, compare notes and stay off the phone and e-mail distractions when together. The meetings include a deadline when all work must stop for the day and for the meeting, which promotes completion of the task at hand.

The NTLC at NDAA is honored to work with NAPC on this project and is thrilled that the project is funded by NHTSA. To obtain expert witness outlines, contact us at the National Traffic Law Center or contact your State TSRP.

The PROSECUTOR

PART TWO

Body-Worn Cameras: Prosecutor-Specific Considerations

BY KRISTINE HAMANN

POLICE-PROSECUTOR COORDINATION ON BWC ISSUES

BWC Policies

Prosecutors should be familiar with their police department's BWC policies. Ideally, the prosecutor and the police department will collaborate on the development of the policy. Even if prosecutors were not involved in the initial policy development, BWC policies frequently evolve and change, so prosecutors will likely have the opportunity to have input on later iterations of the policy. The most common approach taken by police departments is that officers must make every reasonable effort to activate the BWC prior to taking law enforcement action.⁸³ Officers may have discretion to stop recording, if necessary, for their own safety, the safety of others, or if the officer believes that recording the interaction could thwart the law enforcement purpose (e.g., interviewing a victim of a sex crime who would rather not be recorded). For prosecutors, significant aspects of a police department's BWC policy include:⁸⁴

■ **Mandatory Recording:** In connection with its grant

program, the Department of Justice⁸⁵ mandates a policy that requires officers outfitted with BWCs to activate them in all law enforcement encounters with civilians,⁸⁶ and to record until the conclusion of the incident.⁸⁷ This is typical of many police department BWC programs. A "law enforcement encounter" requiring an officer to activate a BWC is usually described as follows:

■ Any enforcement-oriented or investigative encounters, including traffic and Terry stops and vehicle and foot pursuits;

■ Consent searches and execution of search warrants or arrest warrants;

■ Statements of suspects in the field; and,

■ Non-enforcement contacts that become confrontational, assaultive, or enforcement-oriented.⁸⁸

■ **Discretionary Recording:** Some jurisdictions recommend that officers be given the discretion to decide whether to record various non-mandatory incidents or interactions involving witness statements, as well as non-enforcement events when an audio/video record could have value as evidence. Conversely, some policies give offi-

⁸³ ABA TASK FORCE ON BODY-WORN BASIC PRINCIPALS, American Bar Association Criminal Justice Section Task Force on Law Enforcement Body Camera (January 2017).

⁸⁴ For a full list of the topics that police department BWC policies typically address, see Appendix 1 (BWC Policy Checklist).

⁸⁵ The Bureau of Justice Assistance issues grants to select law enforcement agencies to help them acquire and implement BWCs. As a condition of receiving the grant, participating agencies must develop BWC policies, assist in evaluating their BWC program, and are expected to "make a positive impact on the quality of policing" and "inform national efforts to improve the use of BWCs more broadly." U.S. DEP'T OF JUSTICE, OMB BILL NO. 1121-0329, BODY-WORN CAMERA PILOT

IMPLEMENTATION PROGRAM FY 2016 COMPETITIVE GRANT ANNOUNCEMENT, 5 (2016).

⁸⁶ Hurley, *supra* note 9, at 4; Benjamin et al., *supra* note 3, at 21 ("Uniformed police officers should have cameras recording during every interaction with the public and during every exercise of police powers, except when in a consensual interaction where a citizen requests that the camera be turned off.").

⁸⁷ Benjamin et al., *supra* note 3, at 22.

⁸⁸ *Model Police Policy*, *supra* note 64, at 4; Amir Samarghandi, *Cincinnati Police to Begin Wearing Body Cams Aug. 1*, CINCINNATI.COM (June 27, 2016, 5:14 PM), <http://cin.ci/28WAGnb>.

Body-Worn Camera Technology



cers the discretion not to record mandatory incidents when it would thwart a law enforcement purpose.⁸⁹

■ **Crime Scenes:** Some police departments utilize BWCs to record evidence located at designated crime scenes, both as videos and as photographs. In these circumstances, responding officers should coordinate these recordings and any documentation with the department's official crime scene unit.

■ **Suspect and Witness Statements:** Officers may use the BWC to record suspect and witness statements. Prosecutors should understand if, and how, police departments are utilizing BWCs to record suspect and witness statements, and seek input regarding protocols governing these recordings.

■ **Prohibited Recordings:** Importantly, most police departments prohibit the recording of certain subjects, such as undercover police officers and conversations with fellow police officers. Other policies restrict use of BWCs in certain places, such as bathrooms and locker rooms.⁹⁰

■ **Automatic Recordings:** Some police departments are considering using technology that automatically activates recording, thereby removing officer discretion altogether. For example, the camera could potentially be activated when the door to the police car is opened,⁹¹ when the offi-

cer removes a gun from its holster, or when the officer drives into a certain sector of the precinct. This technology is much like the systems used in the “dash-cam” cameras affixed to police cars, which are activated when the police siren is turned on.

■ **Incorrect Recordings:** A police department should have protocols for how to delete recordings made inadvertently. For example, if the officer mistakenly records while in the bathroom, there should be a process for deleting the recording.

Notice and Consent

Some BWC policies address whether an officer should provide notice that they are recording and whether to seek consent from the person being recorded.

■ **Consent to Record:** Some state laws require a police officer to not only notify a person of the recording but also to obtain consent from the civilian before recording an encounter. The obligation for a police officer to obtain consent from an individual to record arises from applicable eavesdropping and audio recording statutes, as well as departmental policies. Laws in “two-party consent states” (including Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire,

⁸⁹ See *Model Police Policy*, *supra* note 64, at 4–5, nn.1–4. Even if these events are recorded, prosecutors may have to consider whether such recordings can be subsequently released to the public. See *id.* at 7 n. 8; Merzon, *supra* note 20, at 11–12; Steven M. Clem, *Use of Body-Worn Cameras by Law Enforcement: Considerations, Issues and Concerns*, WASH. ASS'N OF PROSECUTING ATTORNEYS COMM. 4–5 (June 2, 2015), <http://pccinc.org/wp-content/uploads/2015/07/Washington-Link-1.pdf>. Officials from some jurisdictions recommend prosecutors and police should consult with Sexual Assault Response Team (SART) members regarding filming of sexual assault victims and with hospital administrators regarding filming inside hospitals. See, e.g., Benjamin et al., *supra* note 3, at

23; Barak Ariel, *Technology in Policing: The Case for Body-Worn Cameras and Digital Evidence*, THE POLICE CHIEF 83 at 5, IACP (August 2016).

⁹⁰ See, e.g., Clem, *supra* note 89, at 4.

⁹¹ For example, Austin, Texas is using a “door trigger,” which automatically turns on when the officer opens the car door. Alex Koma, *Austin lawmakers vote to outfit police with body cameras, iPhones*, STATESCOOP (June 29, 2016 1:00 PM), <http://statescoop.com/austin-lawmakers-vote-to-outfit-police-with-body-cameras-iphones>

Pennsylvania, and Washington) may require that all parties consent before a BWC recording may lawfully occur.⁹² Laws in some of these states, however, apply only to telephone calls,⁹³ and the laws of five of these states also include exceptions for (a) law enforcement officials conducting official business, and/or (b) for communications for which there is no expectation of privacy.⁹⁴ Furthermore, some states have exempted BWC recordings from these laws, while other jurisdictions are pursuing exemptions as well.⁹⁵

■ **Notice of Recording to Person Being Recorded:** The requirement for a police officer to provide notice to civilians when recording an encounter using a BWC is dictated both by departmental policy, as well as state eavesdropping and related recording laws. In a state where the subject of a recording must consent to the recording, the officer must provide notice that recording is taking place and obtain consent to the recording. In states where consent is not required, police department policies vary as to whether officers must provide notice to civilians that their BWC is recording. Some police believe that providing notice of recording can assist to de-escalate a tense citizen encounter⁹⁶ and may “improve behavior from all parties” involved, both police and citizen.⁹⁷

Privacy Concerns and Concerns for Victims and Witnesses

Most BWC policies state that officers should not be required to notify or obtain consent for recording a person, provided that the recording is in a public place or if the officer is lawfully present in a private location, for a law enforcement purpose.⁹⁸

■ **Private Residence:** If the officer is lawfully present in a private residence because, for example, the entry is based on a search warrant or exigent circumstances, the dwelling should not be treated any differently than other locations

for purposes of recording.⁹⁹ However, if the officer only enters the premises with consent of the homeowner, then the homeowner may refuse consent to recording in the home as a condition of allowing the officer in the home.¹⁰⁰

■ **Other Private Places:** Some BWC policies restrict use of BWCs in certain places such as bathrooms and locker rooms.¹⁰¹ However, some police departments address the privacy concerns of recording in such places by allowing the recording if it is part of a lawful law enforcement encounter, with the proviso that it can be redacted if the recording is required to be released publicly.¹⁰² Some policies give an officer the discretion to turn off the recording in private places, if the officer believes that the recording will thwart the law enforcement purpose. For example, if a sex crime victim is interviewed in a bathroom and will not speak unless the recording is turned off, the officer should have the discretion to turn off the BWC. It is important for the officer to describe on camera why the recording was turned off as this will minimize attempts by the defense to argue police misconduct.

■ **Concerns for Victims and Witnesses:**¹⁰³ As police respond to a crime scene, BWCs will inevitably record sensitive footage of victims, sometimes at an extremely vulnerable point in their lives. While such recordings are authorized by most BWC policies as part of a law enforcement encounter and can provide excellent evidence of the victim’s initial statements and injuries, they raise many significant concerns. The recording may capture identifying information about the victim, conversations with a victim’s advocate, discussions of safety planning, or sensitive medical information that should not be released.¹⁰⁴ To assure the victim’s safety and privacy, the prosecutor will often need to redact the recordings, seek a protective order, or both. If the victim requests not to be recorded, a BWC policy may give an officer the discretion to turn off the recording when

⁹² See CONN. GEN. STAT. §§ 52-570d, 53a-187, -89 (2016); FLA. STAT. § 934.03(3) (2015); 720 ILL. COMP. STAT. ANN. 5/14-2(a) (2016); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2016); MASS. GEN. LAWS ch. 272, § 99 (1998); MONT. CODE ANN. § 45-8-23(1)(c) (2007); NEV. REV. STAT. ANN. §§ 200.620, 200.650 (1989); N.H. REV. STAT. ANN. § 570-A:2I (2002); 18 PA. CONS. STAT. § 5703 (1988); WASH. REV. CODE ANN. § 9.73.030 (1967); see also Newcombe, *supra* note 22, at 33.

⁹³ CONN. GEN. STAT. §§ 52-570d, 53a-187, -89 (2016).

⁹⁴ See CONN. GEN. STAT. §§ 52-570d, 53a-187 (2016); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(4) (2016); MASS. GEN. LAWS ch. 272, § 99(D)(1)(c) (1998); N.H. REV. STAT. ANN. § 570-A:2II (2002); 18 PA. CONS. STAT. § 5704(16) (2016).

⁹⁵ See, e.g., FLA. STAT. § 943.1718(4); N.H. REV. STAT. ANN. § 570-A:2(II)(j) (2016); PA. CONS. STAT. § 5704(16) (2016); Miller Et Al., *supra* note 21, at 14. (“Efforts are under way to change two-party consent statutes in other jurisdictions as well.”).

⁹⁶ Benjamin et al., *supra* note 3, at 16.

⁹⁷ Miller et al., *supra* note 21, at 14.

⁹⁸ See, e.g., *Model Police Policy*, *supra* note 64, at 5.

⁹⁹ Benjamin et al., *supra* note 3, at 22-23.

¹⁰⁰ *Id.* at 23; ABA TASK FORCE REPORT, *supra* note 83, at 5.

¹⁰¹ See, e.g., Clem, *supra* note 89, at 4.

¹⁰² See e.g., CINCINNATI POLICE DEPT’T PROCEDURE MANUAL, NO. 12.540 (Sept. 29, 2016), 2, § A.4.c, and § F5.a, <http://cincinnati-oh.gov/police/assets/File/Procedures/12540.pdf> (requiring officers to record “all law enforcement-related encounters and activities . . .,” prohibiting officers from recording where there is “a reasonable expectation of privacy (e.g., restroom, locker room) **except** during an active incident,” and requiring redaction of “sensitive and/or private situations”).

¹⁰³ See, e.g., John Wilkinson, *To Record or Not to Record: Use of Body-Worn Cameras During Police Response to Crimes of Violence Against Women*, AEQUITAS, Strategies in Brief, Issue #29 (March 2017).

¹⁰⁴ See, e.g., *Deliberations from the LACP National Forum on Body-Worn Cameras and Violence Against Women*, LACP (January 2017); *Guidance on the Use of Body-Worn Cameras (BWC) During the Administration of the Lethality Assessment Program (LAP)* MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE (June 2016).

recording would thwart a law enforcement purpose. For example, if the witness refuses to speak to the officer unless the camera is turned off, the officer may stop the recording in order to continue the investigation. If the recording is terminated, the officer should first state the reason for ending the recording.

■ **Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rules:** Although HIPAA only applies to “covered entities”¹⁰⁵ such as hospitals or healthcare providers, or “business associates” of such entities as defined under the law, some police departments similarly restrict recording in hospitals and medical facilities.¹⁰⁶ However, most departmental policies state that if there are any valid HIPAA or privacy concerns, the recording may be redacted before it is released publicly or in court. The use or disclosure of HIPAA-protected health information is permitted in response to a court order, subpoena, or summons from the court, a grand jury subpoena, or an administrative request authorized under law.¹⁰⁷ Ultimately, officers must be mindful of their presence in a healthcare facility during investigations to prevent the unintentional recording of protected health information of other medical patients outside the scope of the stated law enforcement purpose.

Ownership of BWC Recordings

Generally, the police department that has outfitted its officers with BWCs owns the BWC recordings. However, departments may purchase proprietary systems from private companies to store and review BWC recordings.¹⁰⁸ In such circumstances, contractual safeguards should be put in place to ensure government ownership of the recordings, including procedures to allow access to the recordings even after the contractual period has ended, permission to remove recordings from the private system at any time and limits on use of the data by the vendor. Care should be taken to

ensure that in the event that the government needs to remove the data from a private, proprietary system, the data (including metadata and tagging information) is delivered to the government in a usable format. Contracts with private vendors who store the BWC data should account for government ownership and control of BWC data, security concerns, and should ensure that the government is able to access BWC recordings in the event that the department decides to use a different vendor or the vendor goes out of business or raises the price of storage. In some instances, these concerns have led police departments and prosecutors’ offices to purchase stand-alone servers, rather than using storage from private vendors, so that they can store and manage BWC data independently.¹⁰⁹

Memorandum of Understanding with Police

In the early stages of developing BWC protocols, prosecutors should consider entering into a memorandum of understanding with their police department(s) to clarify issues that affect prosecutors and police alike. Clarifying these issues early in the development of BWC policies can reduce confusion and conflict in the future. Topics that benefit from early discussion and resolution include:

- Access to the recordings;
- Standards for tagging recordings;
- Department liaisons to assist with identification of recordings, delivery and storage;
- Coordination of Freedom of Information requests;
- Retention policies;
- Protocols for releasing videos to the public; and
- Allocation of redaction and transcription duties.

¹⁰⁵ Health Insurance Portability and Accountability Act Privacy Rule, 45 C.F.R. § 160.103 (2016).

¹⁰⁶ See, e.g., Police Commissioner’s Special Order No. 16-023 § 2.4, BOSTON POLICE DEP’T (July 12, 2016), <https://assets.documentcloud.org/documents/3003378/Boston-Police-s-body-camera-policy.pdf> (“BWC officers should be mindful of locations where recording may be considered insensitive, inappropriate, or may be prohibited by privacy policies. Such June 21, 2016), <https://www.phillypolice.com/assets/directives/D4.21BodyWornCameras-rev1.pdf> (“[O]fficers shall deactivate a Body-Worn Camera prior to the conclusion of an incident or event . . . [w]hen entering a hospital room or private patient area in a hospital”); General Order 10.11 II, S.F. POLICE DEP’T (June 1, 2016), <http://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/SFPD-DGO10.11-Body Worn Cameras.pdf> (“Members shall deactivate the BWC in the following circumstances . . . [w]hen recording at a hospital would compromise patient confidentiality.”); Special Order No. 12 IIB,V, LOS ANGELES POLICE DEP’T (July 16, 2015), http://clkrep.lacity.org/online/docs/2015/15-0479_rpt_LAPD_08-20-2015.pdf (“Officers are not required to activate

and record investigative or enforcement encounters with the public when . . . [i]n patient-care areas of a hospital, rape treatment center, or other healthcare facility unless an enforcement action is taken in these areas.”).

¹⁰⁷ 45 C.F.R. § 164.512(e)(1).

¹⁰⁸ See, e.g., Miller et al., *supra* note 21, at 44-45 (identifying storage considerations and best practices when using a third-party vendor); David Griffith, *The cloud: Beyond Data Storage*, POLICE MAGAZINE (Oct. 10, 2016 Oct. 10, 2016), <http://www.policemag.com/channel/technology/articles/2016/10/the-cloud-beyond-data-storage.aspx> (explaining that, in January 2016, the Detroit Police Department partnered with local gas stations to prevent armed robberies by capturing live video streams, which were stored on Microsoft’s Azure Government cloud and analyzed using Motorola Solutions’ CommandCentralAware).

¹⁰⁹ See *Should You Store Your Video Evidence in the cloud?* (Apr. 15, 2014), <http://www.policemag.com/channel/technology/articles/2014/04/should-you-store-your-video-evidence-in-the-cloud/> (explaining the benefits of storing data locally, such as access and control, versus costs, including the need for IT professionals to maintain the server, data, and managing system over time).

STAKEHOLDER MEETINGS

Police department BWC programs have generated a significant amount of interest from an array of public and government stakeholders. The implementation of a BWC program is an excellent opportunity for prosecutors to meet with members of their community and other elected officials to discuss the many ramifications of a BWC program. Understandably, citizens will have numerous questions about privacy, accountability, and access to the recordings. Prosecutors should be prepared to respond to these questions. As a BWC program is developed, prosecutors and police should seek input from the many stakeholders affected by the program. These stakeholders may include: the courts, defense counsel, probation, parole, advocacy groups such as the ACLU, elected officials, community groups, faith-based groups, and members of the public. Stakeholder meetings and town hall events are important tools for police departments, prosecutors' offices, and government agencies implementing BWC programs to gain input from community members and elected officials, and to identify areas of concern related to the use of BWCs. Some police departments have supplemented town hall meetings with websites dedicated to keeping the community advised of their BWC program.¹¹⁰

Managing Expectations

In addition to explaining the advantages of a BWC program, it may also be important to explain the limitations and capabilities of a BWC program so that the public has a realistic understanding of what a BWC program can and cannot do. Some topics that may be advantageous to address are:

■ **Limitation of Recordings:** The BWC recordings can have limitations based on technological capabilities, the scope of view of a BWC, which officers are wearing a BWC, and discretionary policies for initiating and ending recordings.

■ **Limitations of Release:** The release of BWC recordings to the public may be limited due to ongoing investigations, privacy considerations, ethical constraints or safety issues.

■ **Redaction:** Prior to public release, some information may be redacted from BWC for privacy and safety reasons,

such as child victims, confidential informants, and names and addresses of witnesses.

■ **Officer Accountability:** The process for bringing complaints against a police officer and how recordings are used in this process.

Case Studies: Police Town Hall Meetings

NEW YORK:

■ **New York City:** In 2016, as part of the NYPD's outreach effort while developing its BWC program and policy, the NYPD initiated a series of town hall meetings with the community and NYPD members, city lawyers, and city councilmembers to gain input and hear concerns related to BWC policies and the use of BWCs by police officers.¹¹¹

CALIFORNIA:

■ **San Diego:** In May 2016, the San Diego Police Department held a town hall meeting with community members and police department representatives seeking feedback in developing a policy for releasing BWC recordings to the public.¹¹²

NEW JERSEY:

■ **Cherry Hill:** In August 2016, the Cherry Hill Police Department held a town hall meeting to educate the community on the department's planned use of BWCs three months later.¹¹³

FLORIDA:

■ **Orlando:** In 2015, the Orlando Police Department reported holding several town hall meetings with the Chief of Police and the community as part of an ongoing program to gain citizen input in its BWC program, use of BWCs by police officers, and local issues for citizens related to implementation of the departments BWC program.¹¹⁴

¹¹⁰ See, e.g., *Body-Worn Cameras Project*, City of Greenville Police, <http://police.greenvillesc.gov/1180/Body-Worn-Cameras-Project> (last accessed Jan. 23, 2016).

¹¹¹ Jay Dow, *Queens residents weigh in on NYPD body camera program during town hall meeting*, (July 27, 2016 5:50 AM), <http://pix11.com/2016/07/27/queens-residents-weigh-in-on-nypd-body-camera-program-during-town-hall-meeting/>; see also NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy, NYPD (April 2017).

¹¹² Wendy Fry and Jaspreet Kaur, *Police and Community Meet on Body Cam*

Policy, (May 17, 2016 9:08 PM) <http://www.nbcsandiego.com/news/local/Police-Community-Meet-on-Body-Cam-Policy-379888171.html>.

¹¹³ Cherry Hill Police Department Activity, August 26, 2016, <https://nextdoor.com/agency-post/nj/cherry-hill/cherry-hill-police-department/community-meeting-to-introduce-body-cameras-for-chpd-31303721/>.

¹¹⁴ Program Narrative: Orlando Police Department (Memorandum), available at https://ojp.gov/about/foia/pdfs/foia_releases/2015/2015-DE-BX-K033-Program-Narrative-FL-2015.pdf.

PROSECUTOR ACCESS TO BWC RECORDINGS

Prosecutors and police departments in their jurisdiction will need to develop a process for identifying when a BWC recording exists for a particular case and how the prosecutor will get access to that recording.

Identifying the Existence of a BWC

There are several ways a prosecutor will know that a BWC recording exists and is related to a particular case:

■ **Police Report:** A notation in the police report indicating that a police officer wore a BWC;

■ **Records Management System:** A field in the records management system that indicates who was wearing a BWC;

■ **List of Officers Wearing BWC:** A list of officers who wear BWCs provided to the prosecutors so that anytime an officer on that list is involved in a case, the prosecutor will know to inquire about BWC recordings;

■ **Interview of Officer:** By asking the officer at the time of the case review if he or she was wearing a camera and who else at the scene was wearing a camera;

■ **Receipt of a Link:** In cloud-based systems, the police department may send a link of the BWC recording to either a prosecutor liaison or the assigned assistant; or

■ **Police Department Liaison:** In many instances, the police department will designate a liaison to handle all BWC requests from a prosecutor's office. In larger departments, there may be several liaisons.¹¹⁵ The police department may also have staff to review and categorize videos and to audit that the videos are properly tagged and loaded into the database.¹¹⁶ The liaison can also assist with identifying and correcting inaccurate or missing tags on BWC recordings.

Providing the Recording to the Prosecutor

Once the prosecutor has determined that there is a BWC recording associated with a case, there are a variety of ways that the prosecutor receives the recording:

■ **DVD:** Often in smaller jurisdictions where the BWC recordings are stored on a local server, a prosecutor may simply be provided a DVD with the BWC video footage.

In some instances, recordings from the officer's entire shift will be on the DVD, requiring the prosecutor to find the relevant recording; in other instances, the police department will copy only the relevant sections onto the recording. Most likely, the DVD will be added to the prosecutor's file folder in much the same way as paper police reports. Some police departments may also create DVDs for defense counsel.

■ **The Cloud:** In larger jurisdictions where there is a high volume of BWC recordings, most police departments have chosen to store their recordings with private vendors in the cloud. Rather than receiving a DVD, the prosecutor is given a link to the location within the cloud where the recording resides. In larger prosecutor offices, the links are sent to a central location and then a member of the prosecutor's office will forward the link to the prosecutor who is handling the case. The use of the cloud is evolving to allow the prosecutor to redact the recording on the cloud and to provide access to defense counsel through the cloud.

Lack of Tagging

Especially in the initial stages of a BWC program, there may be instances where there is no tagging or access to metadata on the BWC recording. Similarly, the officer may have incorrectly tagged a recording. This creates a significant burden on the prosecutor to attempt to connect the recording with an event. The prosecutor should establish a protocol for dealing with this issue. Some departments have short retention periods for BWC footage that is not considered evidence, so the recording may be destroyed before the prosecutor realizes that it existed.

FUNDING — INCREASED NEED FOR TECHNOLOGY WITHIN THE PROSECUTOR'S OFFICE

Because any given jurisdiction may have many police departments and one central prosecutor's office, a prosecutor may receive BWC recordings in a variety of formats.¹¹⁷ In addition, the prosecutor's own computer system must be robust enough to handle the large amount of additional data generated by BWC and to redact recordings when necessary.¹¹⁸

¹¹⁵ Newcombe, *supra* note 22, at 40.

¹¹⁶ *Id.*

¹¹⁷ See District Attorneys Association of the State of New York Testimony Before Assembly, *Police Body-Worn Cameras Show Great Promise, But Issues Must be Resolved Before Program Goes Statewide*, Testimony before the Assembly on Codes, Judiciary, and Governmental Operations, 1, 4 (Dec. 8, 2015), <http://www.daasny.com/wp-content/uploads/2015/12/DAASNY-Body-Worn-Camera-Press-Release-and-Testimony-12.8.2015.pdf> (explaining that certain police departments have provided District Attorneys with DVDs without realizing that the District Attorneys did not

have a compatible DVD player).

¹¹⁸ Joel Nihlean, *Looking Through the Lens of Body-Worn Cameras*, TEX. ASS'N OF CTYS. (Feb. 9, 2016) (last accessed Nov. 3, 2016) [https://www.courty.org/magazine/features/Pages/2016 February/Looking-Through-The-Lens-of-Body-Worn-Cameras.aspx](https://www.courty.org/magazine/features/Pages/2016%20February/Looking-Through-The-Lens-of-Body-Worn-Cameras.aspx).

Bandwidth, In-House Storage and Licenses

■ **Bandwidth:** In order to download large BWC files from a cloud storage location to a local server or hard drive, the prosecutor's office must have sufficient network bandwidth. Where an office's internet bandwidth is insufficient, it could take hours to download BWC files, consuming the office's bandwidth and slowing down the office's entire network.¹¹⁹ Even with adequate bandwidth, downloading hours of video will take time and expend resources.

■ **Proprietary Licenses:** If a private vendor owns the cloud storage system, the prosecutor will need a software license in order to use the system. This will typically involve a fee, such as a one-time purchase or a subscription. One vendor provides prosecutors free access to the cloud,¹²⁰ however it is possible that fees will be charged in the future. If police departments within a prosecutor's jurisdiction use different private vendors, the prosecutor may need to purchase separate licenses for each type of BWC program. Each program will involve different protocols for acquiring the BWC.

■ **Number of Licenses:** As a threshold question, the prosecutor's office will need to decide how many cloud licenses to purchase. There may also be separate charges for proprietary redaction tools. The office can either purchase a license for each prosecutor, or purchase licenses that can be shared. If the office only purchases a limited number of licenses, a prosecutor's ability to access the recordings may be limited. Furthermore, such offices will often need to designate an administrator to distribute the BWC recordings to the assigned prosecutors.

■ **Office Based Storage:** In a prosecutor's office, BWC footage can be stored on a DVD, on the cloud, on the assigned prosecutor's computer or in an electronic case file on the office server. If BWC recordings are stored on the assigned prosecutor's computer, the limits of the computer's storage capacity will be reached quickly.

■ **Downloading to the Assigned Prosecutor:** If the recordings are downloaded into the assigned prosecutor's computer from the cloud, the data may overwhelm the individual computer's storage capacity, causing some prosecutors to purchase additional external hard drives to store the recordings related to their cases.

■ **Prosecutor's Case File:** If the BWC recording is received as a DVD, then it can be retained in the same manner as other police paperwork. When BWC recordings are

on the police department's cloud, the prosecutor will have to develop a way to integrate the recording into the office file. Ideally, an office should have an internal electronic file system which stores all the documents and files related to a case, including digital evidence, crime scene photos, surveillance videos and BWC footage. However, many offices store their digital evidence separately from the rest of the case file, which usually is a paper file. When BWC footage is used as evidence, it is essential that the prosecutor separately and locally store that evidentiary portion of the BWC recording with the associated case file.¹²¹

Redaction Software and Hardware

Prosecutors will need to redact BWC recordings for a number of reasons, including witness protection, removing sensitive information pursuant to protective orders, and creating excerpts for trial. This may require additional hardware, such as a dedicated computer,¹²² as well as specialized redaction software. Some cloud storage and review systems from private vendors include redaction capabilities in their software. There are several kinds of programs that can be purchased to redact BWC footage. However, the software has to be compatible with the office's existing systems, network strength and storage capacity.¹²³ The program should keep track of all changes made to an original file. A separate computer may be needed to "render" or finalize the files. Finally, staff must be trained in the use of the redaction software.

■ **Redaction Process:** If an individual's identity or image is prohibited from dissemination, then redaction of the face or other identifying features will be required for each frame, by "black out" or "pixilation."¹²⁴ Additional methods include making the entire recording fuzzy, snipping out sections, and automated redaction that can assist with recognizing and following a face or object. Standard video format uses a stream of 30 still images or "frames" per second, totalling 1,800 frames for each minute of video recording.¹²⁵ Redaction is further complicated by the fact that both the movement of the subject and the camera itself must be accounted for in each frame.¹²⁶

■ **Redaction Time:** Redaction is extremely time-consuming. The average BWC video is thirteen minutes long and it takes a trained person approximately one hour to review and redact information from the recording.¹²⁷ Once the recording is redacted, additional time is necessary to render the file, which can take anywhere from the real-time

¹¹⁹ CBP Body-Worn Camera Working Group, *Body-Worn Camera Feasibility Study Report*, U.S. CUSTOMS AND BORDER PATROL, 1, 12 (Aug. 2015).

¹²¹ *Police Body-Worn Cameras Show Great Promise*, *supra* note 122, at 4-5.

¹²² M. Kurtenbach and Vicki Hill, *Body-Worn Cameras: What Every Trial Prosecutor Needs to Know*, 1, 52 (June 17, 2016).

¹²³ *Id.*

¹²⁴ Steven M. Clem, *supra* note 89, at 11.

¹²⁵ *Id.*

¹²⁶ Quetel, *Body-Worn Camera Video Redaction — more than it seems*, (Oct. 4, 2016), <https://www.policeone.com/police-products/Video-Redaction-Software/articles/227786006-Body-worn-camera-video-redaction-more-than-it-seems/>

¹²⁷ Benjamin et al., *supra* note 3, at 24.

duration of the recording to up to 1.5x the length of the clip.¹²⁸ Computers are also otherwise unavailable for use during the rendering process.¹²⁹

■ **Redaction Costs:** The redaction process is extremely expensive in terms of resources, time, and technology required. One study estimated that redaction costs would consume as much as 21 percent of its BWC budget.¹³⁰ It is estimated that, even if the process were to be outsourced to a third party (an uncommon practice), video redaction would still cost an estimated \$50 per hour.¹³¹

■ **Facial Recognition and New Technology:** Some law enforcement officials believe that facial recognition software is the future of police BWCs.¹³² Facial recognition can accelerate the redaction process by identifying the face of the person that must be redacted from the footage. However, this practice raises a number of potential issues: (1) facial recognition requires a higher pixel capacity than police BWCs currently have;¹³³ (2) some states have already passed laws prohibiting the use of facial recognition to analyze recordings obtained through the use of BWCs;¹³⁴ and (3) even if the technology is used, it often does not work unless the person is fully facing the camera. Other technology is being developed that may assist in these endeavors. For instance, New Orleans recently started using technology that allows for transcribed and searchable video review.¹³⁵ The software, among other things, is an accelerated method of identifying and removing portions of video that are not related to the case. Though still requiring human verification, the software assists with identifying words, faces and even places so that they can be highlighted and removed. However, the programs are not 100 percent accurate, and there needs to be a frame-by-frame verification that the correct information was redacted. For example, if a witness is giving an officer a home address, both the audio and visual portions of the video need to be redacted so that the viewer can neither hear the address nor see the witness mouthing the words. In addition, it is important to have a program that maintains a copy of the original recording and automatically tracks all redactions, edits, and files to ensure proper chain of custody protocols.¹³⁶

■ **Universal Redacting:** Another possibility is to over-

redact by using software to lightly blur the entire recording rather than blurring out specific protected pieces of an image. The relevant portions can then be strategically unredacted, rather than vice-versa.¹³⁷ This technique has been used in connection with broad Freedom of Information requests, but would not be helpful to prosecutors who need to redact for discovery or evidentiary purposes.

FUNDING — INCREASED NEED FOR PROSECUTOR STAFF

Properly implementing and overseeing a BWC camera policy may require additional staff for a prosecutor's office. These significant personnel costs are usually not included in the initial planning for a BWC program. When a police department begins its BWC program, it is important for funding authorities to know the substantial staffing implications for prosecutors. The costs for prosecutors may include some or all of the following:

■ **Legal Liaison for BWC Program:** A prosecutor's office will need a legal liaison who can deal with the many issues that arise with a new BWC program. The various legal issues are outlined throughout this article, including review of police protocols, policies for viewing of recordings, discovery rules, coordination with the courts and defense, and Freedom of Information requests. The legal liaison can also collect BWC recordings that can be used for training by the police or prosecutors and any recordings that demonstrate a need for disciplinary action.

■ **Administrative Liaison for BWC Program:** Just as police departments will typically have an administrative BWC liaison, the prosecutor should have a similar counterpart. This prosecutor liaison may be responsible for an array of technical and logistical issues surrounding BWCs, including: (i) how and when the recordings are received; (ii) tracking outstanding requests; (iii) administering how recordings are sent to the assigned or re-assigned prosecutor; (iv) what to do when there is no tagging; (v) how to store BWC recordings; (vi) coordinating between varying technical requirements between police departments; (vii) addressing redacting issues; and (viii) transcription. The prosecutor liaison should know the protocols of each

¹²⁸ Kurtenbach & Hill, *supra* note 127.

¹²⁹ *Id.*

¹³⁰ Benjamin et al., *supra* note 3, at 10.

¹³¹ *Id.* at 31.

¹³² Karen Weise, *Will a Camera On Every Cop Make Everyone Safer? Taser Thinks So*, Bloomberg Business Week (July 12, 2016 2:00 AM), <http://www.bloomberg.com/news/articles/2016-07-12/will-a-camera-on-every-cop-make-everyone-safer-taser-thinks-so>.

¹³³ *Id.*

¹³⁴ *Could Face Recognition be on Police Body-Worn Cameras by 2017?* (July 20, 2016 4:00 PM), <http://www.planetbiometrics.com/article-details/i/4766/desc/could-face-recognition-be-on-police-body-worn-cameras-by-2017/>.

¹³⁵ *New Orleans First U.S. City to Adopt New Video S.M.A.R.T. Technology from Vu Digital to Help Police, Prosecutors Better Manage Fixed and Body Camera Video and Audio Content*, VU DIGITAL (July 13, 2016 12:12 PM), <http://www.prnewswire.com/news-releases/new-orleans-first-us-city-to-adopt-new-video-smart-technology-from-vu-digital-to-help-police-prosecutors-better-manage-fixed-and-body-camera-video-and-audio-content-300298165.html>.

¹³⁶ *Id.*

¹³⁷ McKenzie Funk, *Should We See What a Cop Sees?*, THE N.Y. TIMES MAGAZINE (Oct. 18, 2016) (In one overredaction test in Seattle, the department processed 2,400 videos in three hours on rented Amazon Web Services computers in the cloud, costing the department \$1.20 for what would have required weeks of manual redaction).

department in the prosecutor's jurisdiction and assist with gathering BWC recordings when multiple police departments respond to one incident. The administrator will also have to keep track of available licenses and passwords.¹³⁸ For instance, in a large office, many prosecutors may have passwords for BWC reviewing systems. Keeping track of the passwords as prosecutors leave the office or change positions within the office can be difficult.

■ **Personnel for Viewing BWC:** Viewing a BWC recording is far more time-consuming than reading a police report that summarizes an event. If there are multiple officers at a scene, viewing time will be increased further as the recordings of each officer may have to be viewed. For example, a one-hour event could result in five hours of viewing if five officers with BWC were at the scene. In contrast, before BWCs, this same event may have been summarized in a one page police report that could be read in five minutes. One prosecutor explained the impact of BWC on a prosecutor's office by saying it is as if every police report increased from four pages to sixty pages.¹³⁹ Though staffing needs have yet to be studied, some loosely estimate that for every 100 cameras on the street, a prosecutor needs at least one additional staff member.¹⁴⁰ In offices where prosecutors are not required to view every recording prior to discovery or plea, the staffing needs may be less. The process by which BWC records are viewed is a question each prosecutor's office must address in order to project personnel needs. There is no doubt that BWC will inevitably increase the amount of time it takes a prosecutor to thoroughly investigate a case.

■ **Approximating Increased Need for Staff:** A prosecutor's office can do a simple calculation based on the average number of arrests by officers with BWCs multiplied by the average recording time per arrest to project the amount of video recordings the prosecutor's office will receive. Combining the hours of video with the office's policy on how and when the recordings are viewed, personnel requirements can be roughly estimated.¹⁴¹

■ **Accelerated Viewing:** To assist with viewing BWC recordings, some vendors have developed an accelerated

fast-forward function that allows the video to be viewed quickly. Some BWC systems utilize technology that allows for simultaneous review of multiple recordings in a split screen.¹⁴² The disadvantage of accelerated viewing is that it is easy to miss something that may be significant, particularly something that was spoken.

■ **Training:** Prosecutors and support staff need to be trained in how to deal with BWC issues, including office policies, access, redaction, discovery, transcription, and viewing by witnesses.

■ **Personnel for Redacting BWC:** A prosecutor's office must have the ability to redact a BWC recording. This may be to protect the identity of vulnerable witnesses, to excerpt recordings for evidentiary purposes, or to comply with the mandate of a protective order.¹⁴³ Redaction is a time-consuming, expensive process that requires trained personnel, special software, and dedicated computers to accomplish the task.¹⁴⁴

■ **Freedom of Information Officer:** Freedom of information requests can be addressed to a prosecutor's office. If requests are made for the release of BWC recordings, personnel must be designated to decide what can be released and if it needs to be redacted in some way.

■ **Transcription of Recordings:** When BWC recordings are introduced in court, a transcript of the recording may be needed. Some states, such as California and Minnesota, require a transcript to accompany any recording introduced as evidence.¹⁴⁵ Transcribing a recording is time-consuming and requires staff. Some BWC system vendors offer related online transcription services that may reduce the time and personnel needed for audio-video transcription.¹⁴⁶ However, outsourced transcripts must always be checked by prosecutor staff to verify their accuracy. If the recording is in a foreign language, a translator will be needed in addition to transcription services.

■ **Certified Forensic Digital Multimedia Evidence Analyst:** The amount of digital evidence used in criminal cases is exploding. Technical expertise is needed for a variety of functions related to this evidence, including collection, enhancement, retrieval of metadata, authentication, storage, editing, converting data to a viewable format and

¹³⁸ Damon Mosler, *Considerations for Policies on Body Worn Cameras in Prosecutor Offices* (May 2016) (unpublished paper on file with author).

¹³⁹ Telephone Interview with John Haroldson, District Attorney, Benton County, Oregon (4/14/2017).

¹⁴⁰ *Police Body-Worn Cameras Show Great Promise*, *supra* note 122, at 5.

¹⁴¹ Telephone Interview with John Haroldson, District Attorney, Benton County, Oregon (4/14/2017).

¹⁴² See Taser Evidence.com, <https://www.axon.io/products/evidence-for-prosecutors>.

¹⁴³ Richard Lin, *Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns*, 14 DUKE L. & TECH. REV. 346, 351-52, 362, 365 (2016).

¹⁴⁴ Kurtenbach & Hill, *supra* note 127, at 44; Michael D. White, *Police Officer*

Body-Worn Cameras: Assessing the Evidence, DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS 34 (2014), https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police_Officer_Body-Worn_Cameras.pdf.

¹⁴⁵ See CAL. R. CT. 2.1040(b) (2016), http://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_1040 (stating transcript of video recording must be provided before recording may be entered into evidence); MINN. R. CRIM. PROC. 26.03(16), https://www.revisor.mn.gov/court_rules/rule.php?type=cr&id=26 (stating that provision of transcript is optional prior to introducing video recording into evidence).

¹⁴⁶ See <http://speakwrite.com/axon/>.

testifying in court.¹⁴⁷ Some prosecutors' offices are hiring staff specifically trained in these skills.

Case Study: Additional Personnel

VIRGINIA:

■ **Chesapeake:** In 2013, the Chesapeake, Virginia Office of the Commonwealth's Attorney hired a video-evidence coordinator to manage video footage of more than 5,000 body-worn camera recordings.¹⁴⁸

ARIZONA:

■ **Phoenix:** The City of Phoenix, Arizona's Prosecutor's Office estimates it will need to hire 30 to 40 additional staff to process video for courtroom proceedings and FOIA requests.¹⁴⁹ In an early estimate, the office believes that it will need to hire or reassign one new staff member for every 100 cameras added by the Phoenix Police Department.¹⁵⁰

FLORIDA:

■ **Orlando:** In 2015, the City of Orlando Police Department stated that the department intended to assign an active, sworn law enforcement officer as the BWC project manager and to hire a civilian to assist the City's Media Relations Officer in processing public records requests from the media and general public.¹⁵¹ It is expected that the civilian's salary will be less expensive than an officer's salary and financed by the City, whereas the BWC Project Manager's salary will remain within the budget of the Orlando Police Department.¹⁵²

WASHINGTON, DC:

■ The Washington, DC Police Department, which employs 3,826 law enforcement officers,¹⁵³ has hired a

privacy attorney to assist with the implementation of its BWC program and procedures, as well as 19 additional staff to handle various aspects of the BWC program.¹⁵⁴

TEXAS:

■ Dallas County: Job Description (excerpts) for a Dallas County Certified Forensic Digital Multimedia Evidence Analyst state that the analyst:

► "Examines, compares and evaluates digital multimedia evidence (DME) in legal matters requiring specialized technical work in the clarification, enhancement, repair, reconstruction, and authentication of digital multimedia evidence. Prepares exhibits, acts as a subject matter expert, presents oral and/or written forensic reports, and testifies as an expert witness in court"...

► "Researches and forensically examines, evaluates and analyzes digital multimedia evidence in support of criminal investigations. Examines and extracts data from crime scenes and other case-related locations; prepares forensic reports; creates exhibits and provides interpretation of analyses of evidence"...

► "Presents oral and/or written investigative reports on the evidence to provide results of the forensic analysis of digital media evidence; prepares exhibits for use in the prosecution of cases"...[and] "provides 'tier one' technical assistance for video players, video files, codec configurations, proprietary players and user errors for the department."¹⁵⁵

INTERNAL PROSECUTOR POLICIES FOR BWC

Viewing Recordings and Discovery Considerations

Once a prosecutor has received a BWC recording from

¹⁴⁷ See *Video Evidence: A Primer for Prosecutors*, Bureau of Justice Assistance (providing guidance on using video evidence in the courtroom).

¹⁴⁸ Margaret Matray, *Police Forces Across the Nation Reaching Out to Chesapeake*, THE WASHINGTON TIMES (June 6, 2015), <http://www.washington-times.com/news/2015/jun/6/police-forces-across-the-nation-reaching-out-to-ch/>.

¹⁴⁹ Dustin Gardiner, *Phoenix Budget Battle: Body Cameras or More Police?*, THE ARIZONA REPUBLIC (May 3, 2016), <http://www.azcentral.com/story/news/local/phoenix/2016/05/02/phoenix-budget-battle-body-cameras-more-police/83567864/> (last visited Nov. 2, 2016).

¹⁵⁰ *Police Body-Worn Cameras Show Great Promise*, *supra* note 122, at 5.

¹⁵¹ U.S. Dep't of Justice, Office of Justice Programs, *Body-Worn Camera Pilot Implementation Program — Program Narrative: Orlando Police Department* 18 (2015), https://ojp.gov/about/foia/pdfs/foia_releases/2015/2015-DE-BX-K033-Program-Narrative-FL-2015.pdf.

¹⁵² *Id.*

¹⁵³ U.S. Dep't of Justice, *2015 Crime in the United States*, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-78/table-78-state-pieces/table_78_full_time_law_enforcement_employees_district_of_columbia_by_cities_2015.xls (last visited Jan. 18, 2017).

¹⁵⁴ Drew Schneider, *Chief Lanier Attends 4d CAC Meeting 4/30*, PETWORTH NEWS (May 1, 2015), <https://www.petworthnews.org/blog/chief-lanier-attend-cac-meeting-430>; Email of Commander Ralph Ennis, Metropolitan DC Police Department, on file with author (March 10, 2015).

¹⁵⁵ See e.g., Dallas County District Attorney Job Description for Certified Forensic Digital Multimedia Evidence Analyst (2016) (on file with author).

the police, it is likely subject to the same rules of discovery as other evidence.¹⁵⁶ As with any evidence, prosecutors must be mindful not to release information that could put a witness's safety at risk.¹⁵⁷ Similarly, issues regarding privacy or confidential police tactics may prevent the release of some information contained in a BWC recording.¹⁵⁸ Important considerations for prosecutors include:

■ **Viewing of BWC Recordings Prior to Discovery:** Ideally, all available BWC recordings relating to a criminal prosecution should be viewed during the early assessment of a case, as well as at other stages of a case. A BWC recording may reveal useful evidence to support a prosecution or uncover information that exonerates a defendant. Reviewing a BWC recording may also expose issues that require additional investigation and assessment. Early viewing of BWC recordings is more likely to ensure a prosecutor's compliance with their legal and ethical responsibilities; however, cost and staffing considerations may make early review extremely difficult, if not impossible. Creating a policy to address this issue may be one of the most significant issues for a prosecutor.

■ **Triaging by Case Type:** If it is not possible to review every BWC recording before discovery, prosecutors may need to alternatively identify and focus on certain types of cases where the police report or the BWC tags suggest a higher likelihood that the recording contains information that should not be disclosed immediately. For example, prosecutors may wish to review recordings of specific types of events, such as violent felonies, victim-related crimes, recordings of minors, and other situations where concerns of witness intimidation or privacy may be present. Prosecutors should be mindful that even if a recording is not viewed, the prosecutor has constructive knowledge of its contents.

■ **Viewing by Non-Lawyers:** Office policies should also address who can view the recording and when. Permitting and assigning paralegals or interns to conduct an initial screening review of BWC recordings is one potential way to balance capacity constraints with necessary pre-discovery viewing.

■ **Timing of Disclosure:** Individual offices' discovery procedures and local statutes will govern when recordings must be turned over. Prosecutor discovery policies should address whether notice of BWC recordings should be given

to defense counsel at the arraignment or preliminary hearing.¹⁵⁹ Further, policies should address whether to provide recordings to defense counsel according to discovery rules or statutes, or at an earlier time.¹⁶⁰

■ **Defense Access:** During discovery, the prosecutor will need to determine how to provide defense counsel with access to the recordings. This can be done by providing the defense a DVD, or providing a means of access to the recording stored in a cloud system. The defense may require a license to view the recording on the cloud. When recordings contain sensitive information or information that could put a witness at risk if disclosed, a prosecutor may redact the recording, seek a protective order or require the defense counsel to review the recording in the prosecutor's office depending on the local rules and statutes.

■ **Audit Trail for Defense:** If the defense is given a DVD of the recording, the prosecutor should indicate in their case files that the recording has been provided to the defense, and the terms of that disclosure. A cloud system may have an automatic audit trail that indicates when a recording was made available to the defense. Importantly, the audit trail on the cloud may allow the prosecutor to determine whether the defense attorney has viewed the recording, and how often. This may raise some legal and ethical issues related to discovery that the prosecutor's office may need to address, depending on the system used to provide defense counsel with access to BWC recordings during discovery.

■ **Who Redacts and When:** A recurring question in the development of BWC programs and policies is whether the police or the prosecutor is responsible for redaction. In some jurisdictions, the police are responsible for all redactions, while in other jurisdictions police do not redact any recordings. At the very least, the prosecutor will need some type of redaction software to edit digital evidence for introduction at trial. Importantly, this redaction software and the protocols by which recordings are redacted must maintain the integrity of the original BWC recording (please refer to the section, "Redaction Software and Hardware," for a more in-depth discussion of the technical requirements for redaction). A prosecutor policy should address who will be responsible for redaction,¹⁶¹ what information is subject to redaction, and whether a court order is required for redaction.

¹⁵⁶ *Model Police Policy*, *supra* note 64, at 6; Damon Mosler, Legal Policy Guide, Chapter Seven (Discovery) 1 (Nov. 16, 2015) (unpublished internal policy); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

¹⁵⁷ Mosler, *supra* note 145, at 1.

¹⁵⁸ *Model Police Policy*, *supra* note 64, at 6, 6 n.8.

¹⁵⁹ *Id.* at 2.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Case Studies: Redaction

ARIZONA:

■ **Mesa:** During a one-year period, the Mesa Police Department received three to four Freedom of Information video records requests per month.¹⁶² Where no redaction was necessary, the resource burden was limited to officer review and processing of the videos.¹⁶³ Where redaction was necessary, editing one video consumed approximately 10 hours.¹⁶⁴

■ **Phoenix:** To appreciate the complexities required to successfully redact, consider this description of the redaction process by the Phoenix Police Department:

All public records requests involving [BWC] video are forwarded to the officer who produced the video. When an officer receives the public records request, the officer is required to view the video in its entirety. The review consists of identifying images and information that should not be released, including NCIC/ACJIS information, personal biographical information, juvenile faces, undercover officers, informants, nudity and other sensitive information as determined by the staff attorney. Any items that need to be redacted are identified by the officer by providing a description and time stamp of the selected images. The request is then forwarded to the MPD Video Services Unit for action.¹⁶⁵

■ **Protective Orders:** BWCs have the potential to create significant safety issues for victims and witnesses. More potent than a police report, the release of a video of a victim or other witness describing a crime may put the witness in extreme danger. The prosecutor must be vigilant in protecting the safety of victims and witnesses through the use of redaction and protective orders, which may be sought for several purposes, including:

▸ **Delayed Discovery:** To protect the safety of witnesses, a prosecutor can seek to delay disclosing the name of witnesses or to redact identifying information, such as contact information and social security numbers.

▸ **Limiting Disclosure:** Limiting disclosure of the video to the defense attorney and the defendant to protect others from knowing the identity of witnesses or other sensitive information;

▸ **Prohibiting Public Release:** Prohibiting defense

attorneys, police, and defendants from giving the video to the media or using the recording in any proceeding other than the instant case;

▸ **Prohibiting Copying:** Prohibiting the video from being copied to any computer program or Internet website, except for computer programs maintained and used specifically for the subject criminal action;

▸ **No Physical Copy to Defendant:** Prohibiting defense counsel from giving copies of the recordings to the defendant. However, the defendant will have the right to see the recording.

▸ **Return of Recording:** Requiring that all copies of the video be returned within at least two weeks after final termination of the case by plea, settlement, judgment, dismissal, appeal, or otherwise.¹⁶⁶

■ **Alternative to a Protective Order:** Obtaining a protective order in every case where it is needed can be a time-consuming endeavor. As an alternative, prosecutors can include an admonition with every recording provided to defense counsel, which requires the defense to agree to restrictions on the use and dissemination of the video prior to receipt. Prosecutors and the party receiving the recording may also stipulate or enter into an agreement mandating confidentiality of the BWC recording.

Case Studies: Protective Orders

CALIFORNIA:

■ **Los Angeles:** The Los Angeles City District Attorney's Office, which handles misdemeanors, does not have the staff to obtain protective orders in all cases where it might be warranted. As an alternative, the office includes the following admonition in every recording sent to defense counsel:

By clicking the download link(s) below, you hereby agree that the body camera recording(s) shall not be copied, disseminated, distributed, shown, or disclosed except at a hearing or trial, or as necessary to prepare for a hearing or trial, in this matter. As required by Penal Code Section 1054.2, you further agree not to disclose victim and witness information that may be depicted in the recording(s) unless specifically permitted to do so by the court after a hearing and a showing of good cause.

This admonition is also used by the Los Angeles County District Attorney's Office.

NEW JERSEY:

■ In New Jersey, police are required to advise

¹⁶² White, *supra* note 151, at 34.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 33.

¹⁶⁶ *Id.*

prosecutors when a BWC recording contains certain sensitive information,¹⁶⁷ so that the prosecutors can appropriately redact.¹⁶⁸ Additionally, if disclosure of a BWC recording may present danger to an officer or civilian or may reveal confidential tactical information, New Jersey prosecutors are required to exercise sound prosecutorial discretion to protect such information from disclosure.¹⁶⁹ This may require seeking a protective order from the court.¹⁷⁰

Viewing of Recordings by Police and Witnesses

Prosecutors should consider developing a policy that governs who can review BWC recordings and what recordings can be viewed.

■ **Officers' Access to their Own BWC Recordings:** Police departments have adopted different policies regarding whether officers can view their own BWC recordings prior to writing a police report. Many police departments require officers to view their recordings before they write incident reports.¹⁷¹ Other departments require an initial written statement before the relevant footage is viewed by an officer, allowing the officer an opportunity to further supplement that statement after viewing the recording.¹⁷² Many departments, however, have policies that do not specify when, and if, officers can view their own recordings.¹⁷³ If an officer is required to tag his or her recordings with information about the incident, the officer usually does so in the field or at the end of the officer's shift. If this is the case, then the officer may have seen the recording prior to writing a police report and may be able to show it to others. Prosecutors should be familiar with the police department's policy about officers' access to their own BWC recordings and, if relevant, confirm whether the officer has reviewed their own BWC recordings, and if others reviewed the recordings as well.

■ **Prosecutor Familiarity with BWC Policy:** The police officer's adherence to the BWC policy may be the subject of cross-examination. It is important for the prosecutor to know whether the policy was followed and, if not, to prepare the officer for questions on that point.

■ **Officers Access to the Recordings of Other Officers:** An officer may have the opportunity to view the recordings of fellow officers either at the scene or later. Depending on the local police department's policies, when interviewing an officer, prosecutors should inquire about what other recordings the officer may have seen in addition to the officer's own recording.

■ **Officer Review of Recordings in Officer-Involved Use of Force Cases:** There is divergent opinion as to whether officers should be allowed to review recordings when there has been an officer-involved shooting or use of force resulting in serious injury.¹⁷⁴ Many departments allow officers to review the recording prior to any interview.¹⁷⁵ Others require that the officer make a statement to relevant authorities concerning the incident without first reviewing the camera footage.¹⁷⁶ Following a use of force incident, some departments require the involved officer to first participate in an initial "walk-through" of the scene, where the officer explains to investigators what happened. The officer is only allowed to view the recording after that initial walk-through. It is important for prosecutors to understand the policies and practices of their local police department regarding viewing of recordings in police use of force cases.¹⁷⁷

Case Study: Witness Access to BWC Recording of Use of Force Incident

NEW JERSEY:

■ Pursuant to the New Jersey Attorney General Law Enforcement Directive No. 2015-1, a state prosecutor overseeing a police use-of force investigation may, in the exercise of sound discretion, authorize a civilian or law enforcement witness to have access to or view a BWC recording of the incident under investigation. To ensure the integrity of investigations of use-of-force incidents and to avoid possible contamination of witnesses' personal recollection of events, no witness has access to a BWC recording of the incident, the response, or the on-scene investigation of the incident, without the express prior approval of the assistant prosecutor, assistant or deputy attorney general, or designee.¹⁷⁸

¹⁶⁷ See *supra* Tagging and Metadata, Case Study: Tagging, pp. 10–11.

¹⁶⁸ LAW ENFORCEMENT DIRECTIVE, *supra* note 33, at § 9.3.

¹⁶⁹ *Id.* at § 9.5.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Benjamin et al., *supra* note 3, at 25; Merzon, *supra* note 20, at 7; Clem, *supra* note 89, at 5–6.

¹⁷² Oakland Police Dep't, Departmental Order I-15.1 (effective July 16, 2015), at § IV.A. 3; see also *Policy Scorecard*, *supra* note 69.

¹⁷³ See *Policy Scorecard*, *supra* note 69.

¹⁷⁴ *Model Police Policy*, *supra* note 64, at 6 n.7.

¹⁷⁵ Miller et al., *supra* note 21 at 29–30; see Benjamin et al., *supra* note 3, at 8. Out of 51 select departments in major metropolis cities, only seven have restrictions on when officers can view records. See *Policy Scorecard*, *supra*

note 69. Of those seven, Oakland Police Department is most restrictive, and requires officers to file an initial written statement before relevant footage is reviewed when officers use force that results in death or serious bodily injury. *Id.*

¹⁷⁶ See, e.g., Benjamin et al., *supra* note 3, at 29; see also ACLU's opposition to officers reviewing their BWC footage in use of force cases: Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports>.

¹⁷⁷ *Model Police Policy*, *supra* note 64, at 6 n.7.

¹⁷⁸ LAW ENFORCEMENT DIRECTIVE, *supra* note 33, at § 10.2.

■ **Witnesses Review of BWC Recordings:** There has been less discussion about whether a witness may view a BWC recording made by a police officer. Allowing a witness to review case-related recordings has certain benefits and disadvantages. Case related recordings can include not only BWC footage, but surveillance videos and recordings made by private citizens. A benefit of showing a recording to a witness is that it may allow the witness to better explain the events that transpired, to help identify other witnesses, and to refresh the witness's memory. On the other hand, because a recording may not have been taken from the witness's vantage point, or may have been taken at a time when the witness was not present, review of recordings could taint or embellish the witness's memory.¹⁷⁹ Importantly, if a suspect is in the recording, witness review of the recording may constitute an improper identification procedure. At the very least, the prosecutor should know what recordings the witness has viewed. Prosecutors should consider developing a policy on when, how, and if a witness can see a video recording.

Release of the Recordings to the Public

Like other types of evidence in pending matters, BWC recordings are typically only made available to the public in limited circumstances. Many agencies have adopted policies prohibiting BWC recordings of encounters related to investigations or criminal offenses from being shared with third parties other than authorized agency personnel, unless such disclosure is: (i) required by court order; (ii) pursuant to the rules of discovery in prosecutions; (iii) the law enforcement agency and prosecutor's office collectively determine that the need for access outweighs the law enforcement interest in maintaining confidentiality; or (iv) in response to a Freedom of Information request.¹⁸⁰

■ **Freedom of Information Requests:** Freedom of Information laws vary from state to state, and some provide greater access to the public than others.¹⁸¹ For example, in Washington State, the Public Records Act requires broad disclosure in response to a request with few limitations.¹⁸² By contrast, North Carolina recently passed legislation specifying that body-worn and dashboard camera "recordings are not public records," and that access to footage may only be granted by court order.¹⁸³ Since both police depart-

ments and prosecutors can be served with a Freedom of Information request, prosecutors and police departments must coordinate their public records disclosure policies, particularly in pending investigations or cases. A primary concern related to such public disclosures is whether a BWC recording's release could adversely impact the investigation or put a witness in danger. If recordings are required by law to be released, they will likely need to be redacted in some form. As redaction is a relatively costly and time-consuming process, office policies should be developed that clarify who is responsible for redactions related to Freedom of Information requests.¹⁸⁴

■ **In-Office Disclosure to the Public:** Some prosecutors only allow the public to view BWC recordings in the prosecutor's office. This may reduce, though not eliminate, the need to redact the recording.

■ **Police Disclosure over a Prosecutor's Objection:** High-profile incidents, such as police shootings or use-of-force incidents, present particular challenges for prosecutors regarding public disclosure of BWC recordings. Given that police departments generally own and control the BWC recordings, police departments may choose to release footage to the public in an effort to diffuse public unrest, despite a prosecutor's request to the contrary. Prosecutors should consider discussing this issue with police during the development of a BWC program, and develop protocols related to the public disclosure of BWC recordings of high-profile incidents.

Case Study: Release of BWC Videos

■ **San Diego, California:** On May 6, 2016, San Diego District Attorney Bonnie Dumanis announced that the San Diego County District Attorney's Office will release available video footage from every officer-involved shooting, once the investigation is complete and if the officer is not charged with a crime.¹⁸⁵ Should the police officer be charged with a crime, the recording would be withheld by the office until it is produced in a courtroom.¹⁸⁶

¹⁷⁹ See Stanley & Bibring, *supra* note 176.

¹⁸⁰ See, e.g., LAW ENFORCEMENT DIRECTIVE, *supra* note 33, at § 9.4.

¹⁸¹ See, e.g., ARIZ. REV. STAT. § 13-4434 (2015); CAL. CONST. art. I, § 28; CAL. PENAL CODE §§ 1054.2 (1998); id. at § 1054.6 (2005); TEX. CODE CRIM. PROC. art. 56.02; FLA. STAT. § 119.105 (2004); N.C. GEN. STAT. § 132-1.4A (2016).

¹⁸² Under the Washington State Public Records Act, government agencies cannot deny requests for records because the requester is anonymous, or the request is too broad; nor can they deny requests simply in order to protect an individual privacy. See WASH. REV. CODE § 42.56.050 (2006); id. at § 42.56.080 (2016).

¹⁸³ N.C. GEN. STAT. § 132-1.4A (2016).

¹⁸⁴ For more on FOIA requests and privacy concerns prior to releasing footage

to the public, see Bakardjiev, *supra* note 80, at 110; Martha Neil, *Police Put Brakes on Body-Camera Plan, Citing Records Request: Earlier Dashcam Suits Were Costly*, ABA J. (Nov 20, 2014), http://www.abajournal.com/news/article/police_put_brakes_on_body-camera_plan_cite_records_request; see e.g. *Body Worn Camera Video Public Records Request Policy*, LAS VEGAS POLICE DEPARTMENT, <http://www.lvmpd.com/Records/BodyWornCameraVideo/tabid/583/Default.aspx>.

¹⁸⁵ Pauline Repard, *DA to Release Most Police Shooting Videos*, SAN DIEGO UNION-TRIBUNE (May 6, 2016, 7:27 PM), <http://www.sandiegouniontribune.com/news/2016/may/06/dumanis-police-shootings-video/>.

¹⁸⁶ *Id.*

■ **Ethical Constraints:** Ethical rules such as Ethical Rule 3.8 (Special Responsibilities of a Prosecutor) of the ABA Model Rules of Professional Conduct may prohibit prosecutors from releasing recordings while a criminal proceeding is ongoing. The rule states:¹⁸⁷

“except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”

■ **Local rules may also prohibit disclosure.** For example, in Indiana, prosecutors who prematurely release evidence may be subject to disciplinary action before the Indiana Supreme Court Disciplinary Commission.¹⁸⁸

Training and Feedback

■ **Training of Legal and Support Staff:** Once office policies for BWCs are established and implemented, prosecutors should train the legal and support staff on the policies and the technical aspects of BWCs.

■ **Prosecutor–Law Enforcement Feedback Loop:** When viewing BWC recordings, the prosecutor may identify training opportunities for the police department regarding legal issues or inappropriate behavior by officers. Prosecutors should consider implementing a procedure for providing feedback to the police regarding conduct observed on the BWC recordings.

Introducing BWC Recordings as Evidence

As with other evidence, before the video can be admitted into evidence and published to the jury, it must be authenticated.¹⁸⁹ Typically, a BWC video is authenticated by a witness to the event, who will testify that the BWC recording fairly and accurately represents what the witness observed.¹⁹⁰ In most cases, BWC recordings will be intro-

duced like any other video recording, and the likely witness will be the officer who wore the BWC. If that officer is not available, someone else who was at the scene may be able to testify that the recording is a true and accurate representation of what occurred at that date and time.

■ **Chain of Custody:** If the authenticity of a BWC video is challenged, or a party alleges that the recording has been altered, prosecutors should be prepared to establish the BWC video’s chain of custody from the start of the recording to its presentation in the courtroom.¹⁹¹ Specifically, prosecutors should consider:

► **Police Procedures:** How does the BWC video get uploaded at the end of the shift? Can the video be edited at any point? Is there an audit trail of who has viewed or altered the recording?¹⁹² If the recording is stored in the cloud, does the system encrypt the recording when it is uploaded? Does the system create a security hash value on the recording that can be used to demonstrate that the original recording has not been altered?¹⁹³

► **Prosecutor Procedures:** How is the recording maintained once it is received by the prosecutor? Who can the prosecutor contact to establish the chain of custody? Is an expert available to explain the BWC camera program and describe how video is recorded and stored?¹⁹⁴

Case Study: Chain of Custody

NEW JERSEY:

■ In 2015, the New Jersey Attorney General directed all state law enforcement agencies to maintain systems and procedures to maintain the integrity and proper handling and storage of BWC recordings by, among other things, documenting and permitting auditing of all instances where BWC recordings are accessed, viewed, copied, or deleted.¹⁹⁵

MARYLAND:

■ In 2015, a working group on the use and implementation of BWCs in Baltimore, Maryland recommended that the city use technology capable of logging any instance during which a BWC recording is viewed,

¹⁸⁷ See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3.8_special_responsibilities_of_a_prosecutor.html; see also Best Practices Recommendation: Prosecutor and Law Enforcement Communication to Media, Prosecuting Attorneys Association of Michigan, PROSECUTING ATTORNEYS ASS’N OF MICH. (June 19, 2015), https://www.michiganprosecutor.org/files/PAAM_Best_Practices_Communications_to_Media.pdf.

¹⁸⁸ See Marilyn Odendahl, *Prosecutors Say Ethics Rules Limit Release of Police Body Camera Video*, THE INDIANA LAWYER (June 29, 2016), <http://www.theindianalawyer.com/prosecutors-say-ethics-rules-limit-release-of-police-body-camera-video/PARAMS/article/40732> (citing

Indiana R. Prof. Conduct §§ 3.6, 3.8).

¹⁸⁹ Hurley, *supra* note 9, at 5.

¹⁹⁰ *Id.*

¹⁹¹ *Legal Issues Surrounding the Use of Body Cameras* 8–9 (unsigned and undated), <https://www.bja.gov/bwc/pdfs/Legal-Issues-Surrounding-the-Use-of-Body-Cameras.pdf>; Hurley, *supra* note 9, at 5.

¹⁹² See *Legal Issues Surrounding the Use of Body Cameras*, *supra* note 199, at 8.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 8–9.

¹⁹⁵ LAW ENFORCEMENT DIRECTIVE, *supra* note 33, at § 9.1.

the identity of the reviewer and length of time of review, whether copies or edits were made, and whether the audit log may support chain of custody.¹⁹⁶ BWC solutions on the market currently include video storage, retrieval, and management solutions meant to ensure and demonstrate an accurate chain of custody. For instance, one vendor allows for the logging of the time, user ID, and purpose associated with each instance in which a BWC video is copied or deleted.¹⁹⁷

■ **Publication to the Jury and Introduction into Evidence:** Prosecutors must be able to present BWC recordings to the grand jury and in courtrooms. Most jurisdictions provide that “the party offering the video evidence is responsible for appearing at the hearing or trial with [the evidence] and arranging for it to be played.”¹⁹⁸ Modern courtrooms may have the appropriate equipment available to play recordings, such as a widescreen television, a projector, computer, wireless Internet, and other equipment.¹⁹⁹ In other less sophisticated court rooms, however, the parties may have to “carry the required equipment into the courtroom to show the video.”²⁰⁰

■ **Introducing a DVD:** Typically, even when a BWC recording is stored in a cloud system, the BWC recording will be introduced into evidence using a CD/DVD.²⁰¹ If the

evidence is on the cloud, then a prosecutor must download the recording from the cloud and save it to a disk, prior to entering it into evidence. This process should be well-documented to ensure the integrity of the original BWC recording and proper chain of custody.

■ **Access from the cloud:** In the future, parties may be able to upload BWC videos directly to a court’s case management system, from which the video can be played to the jury, and, once admitted into evidence, also “included in the electronic case file . . . like an electronic document.”²⁰² It may even be possible to “stream a BWC video directly from its cloud-based environment to show to the judge or jury.”²⁰³ Notably, however, this technology is currently out of reach for most jurisdictions.²⁰⁴

■ **Advising the Jury of Limitations of BWC Recordings:** Although a relatively reliable source of evidence, BWC recordings do have some limitations in terms of evidentiary value. For example, if the BWC device is situated on the officer’s chest, but the officer is looking in a different direction, the BWC will not necessarily capture what the officer saw. Perspective or lighting may also be distorted by camera specifications. A BWC may capture something that the officer did not notice because the officer had focused on something else. As a result, as and when appropriate, prosecutors should be prepared to explain to jurors and the public that BWCs may not provide a comprehensive synopsis of all events that occurred at a particular time.²⁰⁵

CONCLUSION

From daily news broadcasts to the courtroom, police BWCs are a topic of conversation and debate. BWCs are now expected by the public and are becoming a standard component of criminal investigations and prosecutions. The recordings generated from BWCs provide significant evidence and are important tools for prosecutors to evaluate, investigate and prosecute criminal cases. The technology and policy considerations surrounding BWCs are complex and rapidly evolving. Prosecutors need to understand the technology behind BWCs — both its advantages and limitations — so that

they can create sound policies and use this new evidence effectively. Prosecutors should proactively work with police departments as BWC and related technology advances and policies develop. The implications of regular use of BWCs in criminal investigations have yet to be fully understood. The aim of this paper is to provide an overview of these issues. Prosecutors can take a central role in guiding the use of BWCs, so they can be used to enhance investigations, provide increased police accountability and improve the criminal justice system as a whole.

¹⁹⁶ Benjamin et al., *supra* note 3, at 25, 36.

¹⁹⁷ See VIEVU Product Line, VIEVU 3, http://storage.viewu.com/MediaKit/VIEVU_Product_Line_2015.pdf.

¹⁹⁸ Hurley, *supra* note 9, at 5.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* (noting that a physical item containing the video would probably have to be “moved into evidence and accepted in evidence,” as the current rules of evidence “do not allow parties to move a data stream into evidence”).

²⁰² *Id.* at 6.

²⁰³ *Id.* at 5.

²⁰⁴ Hurley, *supra* note 9, at 6.

²⁰⁵ MARC JONATHAN BLITZ, POLICE BODY-WORN CAMERAS: EVIDENTIARY BENEFITS AND PRIVACY THREATS 9 (May 2015), https://www.acslaw.org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief.pdf.

The PROSECUTOR

Door-to-Door Opioid Outreach in Plymouth County



TIMOTHY J.
CRUZ

BY TIMOTHY J. CRUZ

JUST A FEW HOURS have passed since family members found their 20-year-old loved one unconscious on the bathroom floor, suffering from a suspected, non-fatal drug overdose. There is a knock at the door. It is a plain-clothed Plymouth Police officer and a recovery coach. The family invites the officer and coach in and they all sit down together at the kitchen table to discuss what to expect next and possible treatment options. This is the scene being played out each day by police departments throughout Plymouth County, where an initiative is sending teams knocking door-to-door in an all hands on deck approach in the battle to combat opioid addiction.

In 2015, along with Sheriff Joseph McDonald, I formed the Plymouth County Drug Abuse Task Force, an effort to engage all community sectors to work on the opioid issue. The Drug Abuse Task Force brings law enforcement, the medical community, educators and substance abuse experts together to share information and track the current trends of the opiate epidemic. Two of our police chiefs, co-chairs of our Public Safety Committee, had been successfully running programs on their own — one initiative where follow-up visits are made with a victim hours after an overdose occurs, and another, offering community outreach and programming to families. Under the collaborative

efforts of the task force and leadership of Police Chiefs Michael Botieri and Scott Allen, the two programs merged, and Plymouth County Outreach (PCO) was born.

The intent of the combined outreach effort is to provide a human touch in the critical hours of need after an overdose, and to connect family members and friends of those with substance use disorders with existing treatment resources and support in Plymouth County. Each day, police departments review all reported overdose and overdose death reports for the previous 24-hour period and determine where follow-up is necessary. Within 12-24 hours of a suspected drug overdose, an outreach team consisting of a plain clothed police officer is paired with an on-call health care representative — either a licensed clinician or recovery coach — to conduct home visits of overdose survivors. The team attempts to meet with the person who overdosed, but oftentimes it is a sit-down with family members to discuss next steps, their options and potential treatment for the victim. Still other outreach team members find their visits involve simply listening and lending support as family members share their tragic stories of loved ones trapped in the throes of addiction.

The second piece to PCO is outreach at regional

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Drop-In Centers, which act as resource fairs for people with SUDs and their families. These Drop-In centers are open to anyone looking for information about treatment and the setting provides a unique opportunity. Medical personnel and law enforcement officials answer any questions, explain the science of addiction, discuss treatment options and payment options, and assist with getting individuals into treatment. There are currently three regional Drop-In Centers operating within our county that meet up twice a month.

In conjunction with PCO efforts, the Plymouth County Drug Abuse Task Force also funded a new regional database that brings a unified system of overdose incident documentation and systematic follow-up to all law enforcement agencies in Plymouth County. After an overdose, information is shared

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among our PCO membership throughout the county, including identifying the overdose victim, medical services rendered, and confirmation of Fentanyl, Heroin or other opioids and drug evidence found at the scene. Since its implementation in April, the database has allowed for police departments to more accurately track county-wide overdose numbers, establish overdose histories with victims, as well as closely monitor the use of Narcan and check the prevalence of non-fatal overdoses. Because many overdose incidents occur outside of a victim's hometown, the database has become an important law enforcement tool for information sharing between police departments so that

they can assist in connecting the overdose victim with follow-up visits.

The PCO program was first piloted in two Plymouth County towns before the initiative took off. Today, all police departments in the 26 towns in the county and the City of Brockton, and four of our five hospitals, have signed onto participate in PCO. The model is one steadily gaining interest around the state of Massachusetts and beyond. Through social media and our many community coalitions, we are able to get the word out about our Drop-In Centers and outreach efforts and we continue to build upon and expand PCO. Through our door-to-door, follow-up visits, we find that 90 % of the time, we are able to make contact with individuals within the crucial 12-24 hours after an overdose. Since the start of Drop-In Centers, we estimate that approximately 900 individuals have visited and those numbers continue to grow each week. Last month, my office sponsored a Recovery Coach Academy that consisted of five days of training for 13 police officers and civilian volunteers. The academy included training for those in recovery. We are hopeful that very soon, these folks will be assisting us with overdose outreach visits.

While we continue in our traditional roles as law enforcement, this epidemic has forced us to be innovative and develop ways to stay one step ahead. My Office now has a designated Opioid point prosecutor who is focused on drug trafficking cases and those involving subsequent offenders and gangs. Several years ago, we studied how Adverse Childhood Experiences and trauma affected children growing up in domestic violence situations. Today, we are using that model to educate school administrators on the link between opioid addiction and youth.

Plymouth County consists of a diverse array of 27 communities, ranging from small New England towns to urban commercial areas. One thing that they all have in common is opioids and families in search of any and all help. The Plymouth County Drug Abuse Task Force and Plymouth County Outreach are efforts that I am proud to be a part of. There is still work to be done, but we are on the right path here in Plymouth County.

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