

Using Body Worn Camera Evidence during the Filing Decision

A PROSECUTOR'S GUIDE

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Background

The adoption of body worn cameras (BWCs) by law enforcement agencies (LEAs) began slowly. By 2013 about one third of LEAs reported using BWCs.¹ Several high profile incidents like those in Ferguson, Missouri, New York City and Baltimore led to increased pressure on LEAs to adopt BWCs. The resulting rapid increase in BWCs adoption was justified by anticipated benefits such as greater transparency of, and accountability for, actions taken by police officers, as well as greater prevention of liability and risk for LEAs.² Large increases in federal government funding to LEAs facilitated adoption.

Local funding sources also have been focused on LEAs. For instance, in 2016, the Los Angeles City Council approved \$69.6 million in funding for the Los Angeles Police Department's (LAPD) BWC program. Despite the focus on funding LEAs, there has not been a similar focus on funding for prosecutorial agencies handling cases referred by those same LEAs. That disparity in funding has happened despite another benefit and reality of BWC program implementation: collection of audio and video recording evidence for use in criminal investigations and prosecutions. In the instance of the City of Los Angeles, none of the nearly \$70 million in funding for LAPD's BWC program was allocated to the Los Angeles City Attorney's Office (LACA), which prosecutes all misdemeanor crimes committed in the City of Los Angeles, primarily which are investigated and referred for prosecution to LACA by LAPD. The first funding allocated to LACA to deal with LAPD's BWC evidence arrived in mid-2017, with which the LACA created the Prosecution Technology Unit (PTU). During the process of staffing the new PTU with 7 attorneys and 7 paralegals, LACA used existing resources to handle the enormous increase in digital evidence from LAPD's BWC program. As of mid-2018, LACA estimates that LAPD on average shares 5000 BWC recordings each month with LACA.

BWC evidence is more challenging than traditional evidence because it does not arrive "within the four corners of the report" but may be available to the prosecuting agency even before the police report is available. The workflow to access BWC evidence is completely separate from traditional evidence sources. Like traditional evidence, the usability and quality of BWC evidence depends to a large extent on the law enforcement personnel who gather it. Unlike traditional evidence, however, BWC evidence requires the development of new policies and technical expertise before it can be used effectively. Because LAPD began using BWCs in 2015 and now has approximately 7000 BWCs deployed, the LACA has had a great deal of experience with this downstream workflow challenge. LACA reviews a large volume of cases annually (just shy of 70,000 cases from LAPD alone, excluding direct cites, in fiscal year 2015-2016). This is a daunting number, since the impact of BWC evidence could affect each and every such review for filing consideration. Per LAPD, it uploads approximately 14000 BWC recordings a day.

Similar to the funding lag for prosecutorial agencies, funding for research to evaluate the effects of BWCs on police transparency and accountability lagged behind adoption.² Not until 2015 did the federal government begin to increase funding for research. Since 2016, a growing number of studies evaluating BWCs in LEAs have been completed. Throughout this time period, however, there has been little attention paid to the challenges to prosecuting agencies posed by this new source of evidence.³ The

¹ Reaves, B. A. (2013). *Local Police Departments, 2013: Equipment and Technology*. Retrieved from Washington, DC <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf>

² Lum, C., Koper, C., Merola, L., Sherer, A., & Reieux, A. (2015). *Existing and Ongoing Body Worn Camera Research: Knowledge gaps and opportunities*. Report for the Laura and John Arnold Foundation. Retrieved from Fairfax, VA: <https://www.arnoldfoundation.org/wp-content/uploads/Phase-I-Report-Nov-28-2015-FINAL.pdf> and

³ Merola, L., Lum, C., Koper, C. S., & Scherer, A. (2016). *Body Worn Cameras and the Courts: A National Survey of State Prosecutors: Report for the Laura and John Arnold Foundation*. Fairfax, VA: Center for Evidence-Based Crime Policy, George Mason University.

Laura and John Arnold Foundation (LJAF) set out to remedy this inequity. They funded researchers from Temple University to complete this initial study of the impact of BWC evidence on the prosecutor's decision to file through the experience of the LACA. Three categories of lessons emerged: (1) Make the most of existing resources; (2) Make the case for what you need; and (3) Make a list for what you wish.

Although the lessons learned from this research are particularly helpful to the LACA, the same or similar lessons should help any prosecuting agency or individual prosecutor in using and deciding how to use BWC evidence in the filing decision.

Strategies for rising to the challenge presented by BWC evidence

Here are the most important lessons LACA has learned and how the LACA responded to its downstream BWC challenge:

Make the most of existing resources

Interagency communication and collaboration is key to creating an effective digital evidence workflow. In order to maximize the impact of BWC evidence on the prosecutor's decision to file, any and all BWC evidence for the case that is submitted for filing consideration should be provided at the time of submission by the LEA to the prosecuting agency. Achieving this requires the following components.

1. *LEAs and prosecutors should jointly develop protocols regarding the sharing of BWC evidence.* Prosecutors should learn whether LEAs that submit cases for filing consideration have BWC programs, request notifications from LEAs when BWC programs are instituted or changed, and consult with LEAs regarding which BWC programs have been, are being, or will be instituted. In doing so, prosecutors should collaborate with those LEAs about the executing order or other documentation that establishes the LEAs' procedures for the BWC program. If multiple LEAs submit cases for filing consideration to a particular prosecuting agency, then the prosecuting agency can and should collaborate with all of those LEAs with the aim to establish the same or similar sharing protocols for a more uniform workflow.
2. *BWC evidence should be shared by LEAs at the time a case is submitted for filing consideration.* BWC evidence should include all BWC evidence related to that case, and only BWC evidence related to that case. Any and all BWC evidence that is shared should be an exact copy of the recordings and should not be redacted. Prosecuting agencies also should decide with whom LEAs should share those recordings; whether that be the entire prosecuting agency, a specific branch or unit of that agency, or to individual prosecutors of that agency.
3. *All BWC recordings should be identified and be linked to a particular incident/case for which the recording was generated.* Although there may be a technological solution on the horizon in Computer Aided Dispatch/Records Management System integration with BWCs, the LACA recognized utility in requiring individual officers to identify BWC recordings with a number unique to the incident or case for which the recording was made. In March 2018, the LAPD issued an order requiring all of its officers to identify each and all of their recordings with the Incident Number, the full Incident Number, and only the full Incident Number, for

which each recording was made. That makes sharing of the case folder of recordings with the LACA more complete and more correct, as well as less onerous.

If BWC recordings are not automatically linked to individual incidents, then prosecuting attorneys should seek LEAs to require that individual officers identify all recordings with an identifier that specifies for which case each recording was made. Additionally, prosecuting attorneys should seek a requirement that all reporting officers include whether BWCs were activated for a particular incident, why BWCs were not activated for a particular incident, and list any and all officers that responded to a particular incident.

4. *Prosecuting agencies should be trained on each BWC evidence platform used by its LEAs.* Training should include how to use those platforms to find the BWC evidence associated with a particular case and the protocols of how LEAs are to share that BWC evidence with the prosecuting agency. Prosecuting agencies should share what has been learned from that interagency communication with all those in the prosecuting agency.
5. *Prosecuting agencies should draft and implement filing guidelines specific to BWC evidence.* In doing so, questions that should be asked include: Must or should BWC evidence be reviewed when filing all or certain charges? If so, which charges? Who should review BWC evidence? What weight should be afforded BWC evidence in relation to all other evidence? How should review of BWC evidence be noted for future reference?

Make the case for what you need

In addition to making the most of what prosecuting agencies currently have, such agencies and its prosecutors should make the case for what they need. Specifically, the availability of BWC evidence for the filing decision warrants better technology and more personnel.

1. *Adequate and appropriate technology and training is essential.* Without adequate and appropriate technology to handle the use of BWC evidence, any increase in personnel likely will not address the needs related to BWC evidence. Therefore, prosecuting agencies and its prosecutors should be equipped with appropriate technology to deal more efficiently with BWC evidence. Bandwidth, hardware, operating systems, internet browsers and storage all should be capable of dealing with BWC evidence supplied by LEAs. Additionally, equipping filing attorneys with a second monitor screen increases efficiency and multitasking, whereby the BWC recordings can be reviewed while the attorney completes the computerized work necessary or helpful to execute the filing decision. Quality headphones also assist in listening to exactly what is communicated on the recording while not disturbing others within hearing distance of the computer where the BWC recording is being reviewed.
2. *Calculate and request the appropriate staffing levels to handle the evidence associated with those technologies.* Since January 2018, the LACA has increased the amount of attorneys, added paralegals and utilized volunteer interns to assist with BWC evidence. Among all the needs created by BWC evidence, including discovery and trial issues,

the LACA has allocated one of the seven attorney positions funded because of BWC evidence to its specialized Family Violence Unit to increase the number of filers in that unit and thus to increase the amount of BWC evidence that unit reviews at the filing stage in cases where research indicated BWC evidence was helpful to review the demeanor of the victim and the defendant, as well as physical manifestations of violence. Additionally, two of the remaining six attorney positions may assist with making filing decisions in the two branches that file the most cases when the recommended charges are those where research indicates BWC evidence may be especially beneficial, because the actual crime may be captured on BWC evidence (battery against peace officers or resisting arrest) or where BWC evidence can corroborate the report where otherwise corroborating scientific evidence is not present (such as DUI refusals).

3. *Use of paralegals and interns to assist with the review of BWC evidence in the filing process.* Such individuals can review the recordings and help pinpoint whether any helpful evidence in the filing decision is present and where in the recordings such evidence is present, thereby cutting down on the amount of footage filing attorneys must watch, if any at all, in making the filing decision.

Make a list for what you wish.

Once prosecuting agencies and its prosecutors make the most of what they have, and make the case for what they need, they should make a list for what they wish. In doing so, prosecutors should think ahead to the future.

1. *Identify technology and personnel wishes associated with digital evidence more generally.* Now that BWC evidence is created, stored, shared and used digitally, other evidence can be handled the same way. Dashcam audio/video, 911 and radio dispatch calls, photographs, and even evidence received from civilians such as cell phone video, audio and photos, will be able to be handled in the same manner as BWC evidence. Even police reports will be prepared and stored digitally. Prosecutors should begin to ask: What technology will be useful in dealing with that transition? What personnel will be useful in dealing with that transition? Is there an expanded role for personnel who use technology to prepare digital evidence at each stage of case processing from filing consideration to court presentation?
2. *Identify desired changes in the law associated with digital evidence.* Most importantly, what law will be useful in dealing with the transition from traditional forms of evidence to digital evidence? If current law is not interpreted to limit discovery disclosed to the defense in one case to use solely in the one case in which it was disclosed, then the privacy interests of victims, witnesses and even defendants will be compromised. That, in turn, could compromise other investigations by LEAs and impact the filing decision in those other cases because of the failure to protect privacy interests of all those particular individuals and types of individuals in prior cases.

Conclusion

BWC evidence has focused the LACA on the future of evidence. With the benefit of the research study, and its findings and conclusions, lessons have been learned. The challenges will be how best to address the current situation, and then how best to prepare for and deal with the future before it happens.