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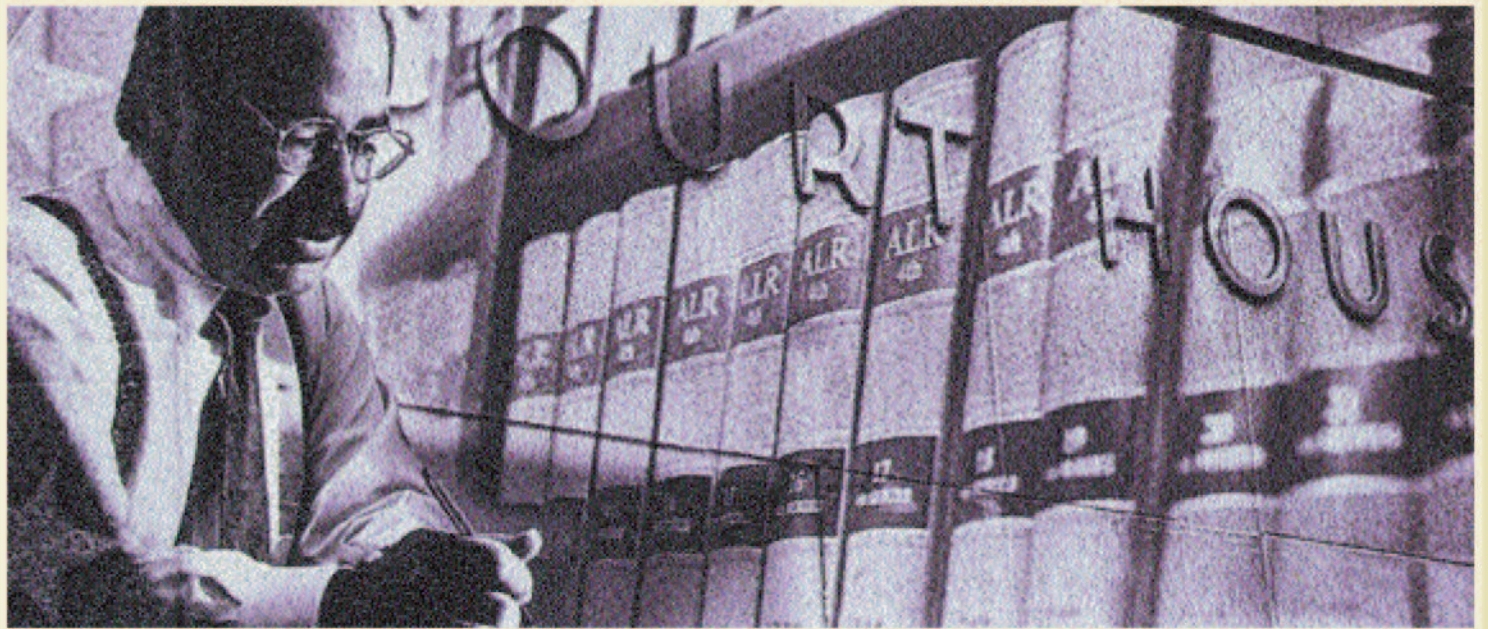
# *The* PROSECUTOR



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**IT'S TIME TO DEMAND AN END TO SEX-BUYING**  
**HOW PROSECUTORS ARE RESPONDING TO SHIFTING VIEWS ON MARIJUANA**  
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**POLICE BODY-WORN CAMERAS: WHAT PROSECUTORS NEED TO KNOW/PART I**





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### ABOUT THE COVER

The historic Blair County, Pennsylvania courthouse was built in 1875 in the Italian Gothic style. An addition to the rear in 1906 created a T-shaped plan. The courtroom and Lawyers Lobby of the addition was designed in the American Renaissance style. In 1999, a modern replication addition was added to the site. Photo by Kirk Meyers

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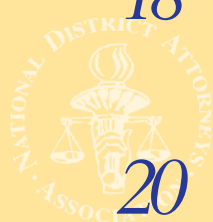
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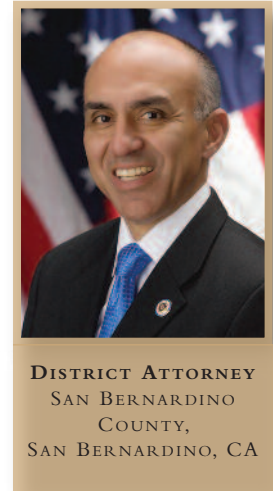




# MESSAGE

*from the Past President (2016–2017)*

MICHAEL A. RAMOS



DISTRICT ATTORNEY  
SAN BERNARDINO  
COUNTY,  
SAN BERNARDINO, CA

## The Best Team in America

**MAKE NO MISTAKE:** One of the highest honors of my professional career was being elected president of NDAA. As a team, we accomplished many of the goals that we established for our organization, we transitioned into a new U.S. administration and we made some policy and personnel changes that will carry this top-notch organization into the future.

From the beginning, I had two major goals to accomplish. In order to move forward in a positive direction, we had to balance our finances and increase membership. With the help of dedicated teammates from all across our nation, we accomplished that and more! The finance committee worked tirelessly to help us finally turn the corner from a fiscal standpoint, and we now have a budget that we can wrap our arms around. I want to thank Duffie Stone, Ray Morrogh and our current president, Mike Freeman for leading the charge.

Our membership drive was amazing, being led by one of the best prosecutors in America, Henry Garza—who twisted a lot of arms. When Henry calls, y’all came a running! Our membership increased by over 1,400 last year, and while these are numbers, what they really represent is a more diverse voice from prosecutors all across America. If our goal is to sustain this organization for years to come—and to truly be a voice for prosecutors and the victims we represent—then we must continue to be a unified voice that represents all ages, all backgrounds, and from all pockets of our nation.

Another huge factor that led to our success this past year was the work of Peg Dorer and Kimberly Overton, who both helped us make our training run more efficiently by looking at what works and what doesn’t. Our training is now running full steam ahead with attendance increases across the board. More importantly, we have some of the best training in America!

Along with those highlights, we had the opportunity to

meet with our new U.S. Attorney General Jeff Sessions and his staff. After our meeting, it was clear that his team is truly on board with our fight against gangs, drug cartels, the opioid epidemic and crimes against peace officers. He made it clear that our organization is the voice for prosecutors across America. Speaking of Capitol Hill, we also had a productive winter conference in Washington D.C. and Nelson Bunn did another extraordinary job preparing us for our meetings and the important discussions that took place.

Finally, I want to thank my Executive Committee. I was blessed to have such a phenomenal team—each member bringing something unique to the table—and Fitz playing shortstop was key! I would be remiss if I didn’t mention Mary Ashley and the great work she has accomplished for the Women Prosecutors Section. Working alongside her colleagues, she helped develop a stronger network of our members dedicated to education, mentorship and promoting increased opportunities for women prosecutors.

Finally, as you can see, I mention America several times. We live in the greatest country in the world and we should be proud that we truly are the voice for not only prosecutors but victims and their loved ones. Each of us has his or her own reasons for having joined this wonderful profession, but what brings us together is this amazing organization. Thank you for the job you do every day in the courtroom, and behind the scenes, to uphold this fine institution in an ethical and just manner. And thank you for the opportunity you gave me to serve as your president. During my tenure, I had the chance to meet new people and strengthen old friendships, and I look forward to continuing on that path. Stay strong, stay the course, and remember the reasons why we became prosecutors in the first place.



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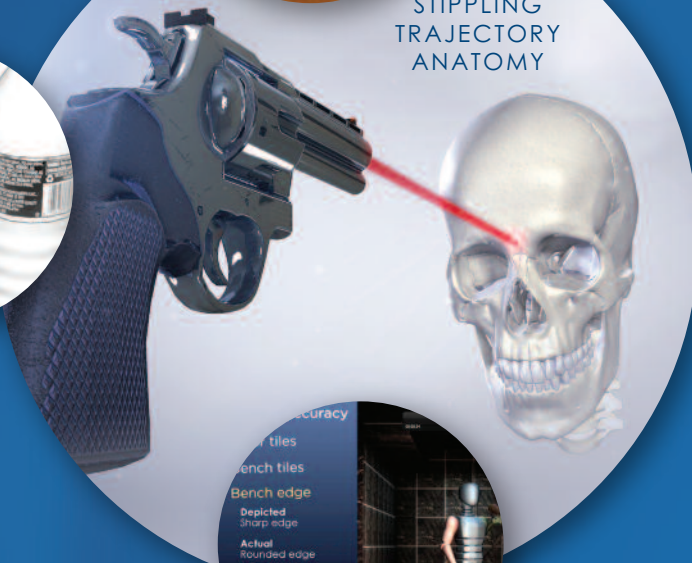


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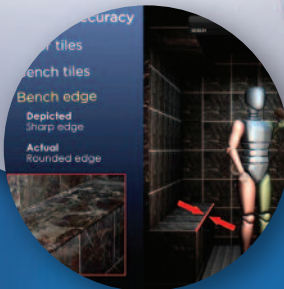
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# VIEW

## *From the Hill*

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



NELSON O.  
BUNN, JR.

**CONGRESS HAS RETURNED** from its annual August recess faced with several key decisions on funding the government, raising the debt limit, and providing aid to areas ravaged by Hurricane Harvey. Many other bills in various policy areas have also come back into play ranging from human trafficking to accessing electronic evidence.

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](mailto: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 September 30, 2017 under a Continuing Resolution. Congress is looking for a path forward to fund the government past that date, raise the debt ceiling limit and provide aid to areas impacted by Hurricane Harvey. Debate is currently ongoing around individual appropriations bills to fund government agencies past the deadline. The likely outcome is a short term Continuing Resolution through early December, with the debt limit increase and Harvey aid combined into the overall package.

### DRUG POLICY

- As a reminder, NDAA formed a Marijuana Working Group tasked with developing association policy on various aspects of the marijuana debate, including impaired driving, access by children, conflict of federal versus state law, and other related issues. The working group held five conference calls and released its final white paper toward the end of April. That final white paper can be [found here](#).

- On June 27, NDAA cosponsored a congressional staff briefing on the House and Senate side to highlight the potential impacts on the black market due to legalization in some states. Chuck Spahos, the Executive Director of the Prosecuting Attorneys' Council of Georgia and co-chair of NDAA's Marijuana Working Group, represented NDAA on the panel.
- Through a partnership with GovExec's Route Fifty, NDAA Marijuana Working Group co-chairs, Eric Zahnd and Chuck Spahos, [penned an op-ed](#) on the release of the group's white paper and the status of marijuana policy currently.

### ELECTRONIC COMMUNICATIONS

- At the start of the new Congress, Rep. Yoder (R-KS) once again introduced the Email Privacy Act, which would update the Electronic Communications Privacy Act. Due to the overwhelming vote last Congress on the legislation, the House Judiciary Committee was bypassed and the bill passed under suspension of the rules. Its future remains unclear in the Senate still, but NDAA and all national law enforcement groups remain opposed to

the legislation in its current form. At a minimum, NDAA requests language that would allow for exemptions under the warrant for content requirement to include exigent circumstances and consent situations, such as publicly posting on a social media site. The bill also lacked a provision addressing service provider response times when law enforcement requests electronic information.

- NDAA and other law enforcement stakeholders continue to engage with staff prior to reintroduction of the Kelsey Smith Act, which would provide an emergency exception for accessing location information under certain circumstances.
- NDAA continues to participate on a working group to quantify the “going dark”/smartphone encryption problem impacting investigations across the country. Recently, an additional push was made to solicit participation by member agencies to submit data related to the problem. There has been a good response to that solicitation. NDAA welcomes additional agencies to participate and learn more. If interested, please contact Nelson Bunn at [nbunn@ndaajustice.org](mailto:nbunn@ndaajustice.org).

## FORENSIC SCIENCE

- On August 7, Deputy Attorney General Rod Rosenstein announced the appointment of Ted Hunt out of the Jackson County, MO prosecutor’s office, as the new Senior Advisor on Forensics for the Department of Justice. [NDAA released a statement](#) in support of the appointment after the announcement.

## HUMAN TRAFFICKING

- NDAA announced its support for the Trafficking Survivors Relief Act, introduced by Rep. Wagner (R-MO) and Rep. Gabbard (D-HI) in the House and Sen. Gillibrand (D-NY) and Sen. Portman (R-OH) in the Senate. The legislation would create a mechanism by which an individual coerced by a pimp and who is a direct victim of human trafficking may petition the court to have certain non-violent offenses expunged from his or her record. The legislation would not require a judge to grant any petition and the movant must show by clear and convincing evidence that he or she is a victim of a severe form of human trafficking in order to be eligible for the expungement of a conviction.
- NDAA announced its support for the Abolish Human Trafficking Act of 2017, introduced by Sen. Cornyn (R-TX) and Sen. Klobuchar (D-MN) in early June. The bill

updates the Justice for Victims of Trafficking Act passed in 2015 and provides additional tools for law enforcement to combat human trafficking.

- At the request of NDAA, Sen. Thune (R-SD), Sen. Nelson (D-FL) and Sen. Klobuchar (D-MN) introduced the No Human Trafficking on Our Roads Act, which would institute a ban on a commercial driver’s license, without reinstatement, for an individual convicted of a human trafficking felony committed through the use of a commercial motor vehicle. The legislation quickly passed on a voice vote out of the Senate Committee on Commerce, Science and Transportation on August 2. It now goes to the full Senate for consideration. An identical House version should be introduced in the near future. [NDAA wrote a letter](#) in support of the legislation in early August.
- NDAA announced its support 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.

## JUVENILE JUSTICE

- Recently, NDAA participated with the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in a webinar with over 500 participants to discuss NDAA’s recently revised and adopted national juvenile justice prosecution standards.

## MISCELLANEOUS

- Through a partnership with GovExec’s Route Fifty, NDAA continues to publish articles related to issues facing prosecutors in the field. Articles published thus far have focused on marijuana policy, campus sexual assault, mental health, juvenile justice, human trafficking, the opioid crisis and prosecutor-led diversion and officer involved shootings. The full series [can be found here](#).

**Questions or feedback:** Please contact Nelson Bunn at [nbunn@ndaajustice.org](mailto: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>.

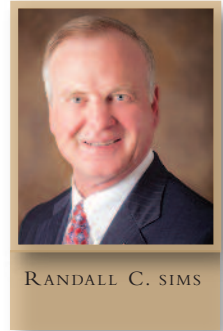


# The PROSECUTOR

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## Taking on Mental Health Issues with What You Have

BY RANDALL C. SIMS



OUR FELONY CRIMINAL JUSTICE SYSTEM consists of this office and five district courts, three of which have jurisdiction in Randall County, which is outside of my jurisdiction. In 2007, our jurisdiction started an accountability court for probationers with technical violations. After a couple of years, we realized that a vast majority of those in the program had drug problems, so we modified it into a drug court in 2009. In 2014, we added a re-entry court for those returning from Substance Abuse Felony Punishment Facilities (SAFPFs). So, we have a history with specialty courts in this jurisdiction.

Most recently, in 2016, we implemented a year-long, felony-level, pre-trial intervention program for veterans and those with mental health by simply using what we had available—AKA no additional funding. To get it off the ground, we included people from the offices of the district attorney, probation, county jail, the local mental health community (Texas Panhandle Center), Veterans Affairs, community mental health care providers, graduate students at West Texas A&M University, and the local defense bar. It has been a huge win for all involved, and it has not cost taxpayers an extra penny.

### LAUNCHING THE PROGRAM

When County Judge Nancy Tanner ran for office a couple of years ago, one of her top priorities was to work on the huge mental-health issues in our county jail. Upon taking office January 1, 2015, she hit the ground running with this issue by gathering up stakeholders to come up with a plan for helping defendants (both misdemeanor and felony

offenders) with mental illness.

After about a year of development, a mental health docket for misdemeanor offenders was started. As for felonies, we considered both a veterans' court and a mental health court. Both offered features we liked, but both would have required additional funding that was nonexistent in our county. We did not even have enough money for one, much less two, specialty courts. Plus, if we chose one over the other, we would be leaving out people who needed help. That was unacceptable to me and to Jason Howell, an assistant district attorney whom I hired in June 2015. Jason came to us from the Galveston County Criminal District Attorney's Office, where the elected CDA, Jack Roady, had Jason working on that office's veterans program. Jason and I decided we would develop our own mental health intervention program utilizing the assets available to us.

We wanted to address the increasing number of defendants who are either veterans or civilians that have a diagnosed mental health condition or traumatic brain injury. After investigating the traditional mental health and veterans court programs, we decided to implement a home-grown, pre-trial intervention treatment program on a small scale (to gather data and work out the kinks before launching a massive system). We reached out to various groups to be part of the program (more on that later), and not one person turned us down! From the beginning, Jason and I were very optimistic about the plan we developed. Each team member was very excited and glad to be a part of the group that would implement this program.

We intentionally kept the number of participants low (just five people) to see how the idea would work and to

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keep it manageable. We also limited eligibility to those charged with nonviolent offenses. (Those offenders charged with assaultive offenses can apply but are very heavily scrutinized. We made this exception because mental health issues are sometimes the root of violence.)

## THE FIRST CALL

Our first step in building the program—the most important—was to contact West Texas A&M University. We have found that local colleges and universities are a severely under-utilized resource for the criminal justice system, and we needed the buy-in of those at the university or we were dead in the water.

Students who are working on their master's degrees in counseling must have at least 300 hours of actual counseling experience to earn their degrees, and it can be difficult for them to fulfill this requirement. We had the idea to use

*After investigating the traditional mental health and veterans court programs, we decided to implement a home-grown, pre-trial intervention treatment program on a small scale*

these graduate students as the counselors for our intervention program, which would serve the dual purpose of earning counseling hours for them and providing (free) therapy to those participants in the program. The students and their professors leapt at the chance to help.

Our program utilizes graduate students as counselors and case managers for the participants, and a professor oversees their work. The goal is to keep this as a treatment-based plan rather than a criminal-justice-based one. By employing counselors (rather than law enforcement or probation officers) as the main point of contact, participants are more inclined to be honest with the staffing committee (more on that in a bit) when failures occur, and they get access to mental health treatment that they may not otherwise

receive in the community. Participants can also visit with counselors via video calls if an in-person visit is too difficult. It is a win-win for both the graduate students and the program participants. It has also saved tax dollars in allowing defendants to participate without having to pay for mental health services.

## STAFFING COMMITTEE

The next step was deciding who should be on our staffing committee; this is the group of people making decisions about the program and its participants. They meet with the participants outside of court, make recommendations to the judge, and propose changes and improvements to the program as a whole. We wanted to include a diverse group to get as much input from all of the different parties as possible to show participants that an entire community is behind helping them to succeed. The staffing committee includes prosecutors from our office, probation officers, professors and grad students from West Texas A&M, sheriff's department and county jail mental health staff, VA officials, medical professionals, and members of the Panhandle Defense Bar. Having a large and diverse committee was problematic at first because everyone has his own perspectives and experience, and it is difficult to bring everyone together for meetings, but the program has wider support with a larger staffing committee because so many groups have "skin in the game."

Traditional veterans' and mental health courts typically have an administrative or overseeing judge, but we chose a different path for our jurisdiction. Because we started this treatment program as a pilot, we went to all of our district court judges and gave them a brief overview to let them know what we were doing. They have given their support, and at least one participant has come from each of the district courts. Because there is no "overseeing judge", when the staffing committee makes a decision to approve a participant, impose a sanction, or to discharge someone (which luckily has not happened to date), the defense attorney and prosecutor simply hold a hearing in the court with jurisdiction of the criminal case and present the decision to the judge for approval. Thus far, this approach has worked very well.

## WHERE PARTICIPANTS COME FROM

Our program gets recommendations for participants from several sources. The VA Justice Outreach Program contacts our office when a veteran who might be a good candidate for the pre-trial diversion, is incarcerated. Judges and trial

prosecutors can alert the prosecutor in charge of the program (Jason Howell) that someone may be an eligible participant. Law enforcement, usually from the jail, are a source of referrals to this program as well, as is the defense bar.

After receiving notice of a potential candidate, we send an email to the defense attorney that includes an application to go over with their client as well as a medical release (veteran or civilian form). They fill out only the medical release form pertinent to their client. (See sidebar on below for sample e-mail and application.) To enter the program, we require a signed judicial confession because candidates must be competent to participate. If there is a question concerning competency, that issue must be resolved before the process can continue. If a defendant declines to sign the confession, they cannot participate in our program.

The defense attorney turns in the application, any records she has obtained, and a signed HIPAA (Health Insurance Portability and Accountability Act) release. We require the HIPAA release so the staffing committee can talk with the counselors and medical professionals to come up with an individualized treatment plan for each participant and to modify it as needed. Once the prosecutor in charge of the program has received the application, HIPAA release, and records, that prosecutor will gather any additional documentation that will help in screening and assessing the candidate.

Once all the documentation is gathered, the staffing committee meets to discuss the candidate's entry into the program. We work with the candidate's current medical and mental health providers to write an individualized treatment plan. If there is no current treatment provider, the local mental health group and our West Texas A&M partners develop the treatment plan. After a plan is worked out and the staffing committee has given its stamp of approval, the prosecutor and defense attorney sit down with the candidate to verify that he wants to participate. The candidate must sign a contract with a judicial confession (See sidebar for link).

Once all that has happened, there is a hearing in the original court with jurisdiction over the criminal case. The judge reviews the contract and treatment plan and then grants or denies the candidate's enrollment in the program. (See sidebar on page 15 for sample admonishments that the judge should give to the candidate.) The pro-

gram lasts for one year, and after the participant has successfully completed the requirements, there is a graduation and dismissal hearing in the original court.

## NOT THE EASY WAY OUT

Some might think that a treatment program is an easy way out for defendants, but that is far from the truth. This is definitely not a "get out of jail free" card. Participants still have to meet with probation at least once a month, stay in constant contact with a counselor and case manager, keep up with medication, make VA appointments, attend Alcoholics Anonymous meetings or post-traumatic stress disorder (PTSD) treatment, and whatever else might be in his treatment plan. On top of all that, many times we include family counseling in the plan to develop a support network for the participant and teach him how to deal with the rigors of

### Sample e-mail to Defense Attorney

Dear Mr./Ms. Attorney,

Your client, John Doe, has been recommended as a possible candidate for the 47th Judicial District Attorney's Office Veterans and Mental Health Treatment Pre-Trial Diversion Program. I have included the application, which completely goes through the process and parameters of the program. Please read the application and consult with your client to determine whether he/she qualifies and would like to apply for the program.

If your client would like to apply, please get a signed HIPAA [Health Insurance Portability and Accountability Act of 1996] letter allowing our office and the staffing committee access to your client's medical records, mental health records, and discussions with his/her treatment provider. If your client does not have a current treatment provider, let me know and we will find an appropriate provider for your client. Once you and your client have filled out the application, procured the HIPAA letter, and gathered records, please either email those documents to our office or drop them off in person for the process to continue.

If you have any questions, please don't hesitate to call. Thank you for your prompt attention in this matter and thank you for helping our veterans and citizens needing mental health treatment.

Link to:

- [Veteran's Felony PTI Contract.docx](#)
- [Veteran's Felony PTI Application.docx](#)

<https://www.tdcaa.com/journal/taking-mental-health-issues-what-you-have>



everyday life. Once a month, the participant must also talk to the staffing committee to report on their progress, any problem areas, and any necessary changes to his treatment plan. All of this is on top of any work and family responsibilities the participant may have.

We have had to address several issues to get participants on track and make the program run more smoothly. Generally, that has involved tweaking participants' treatment plans. For example, one participant attended a drug program three times a week and began showing signs of PTSD. We modified his plan to only two drug classes per week so we could add a session of family counseling for the PTSD; addressing the PTSD will also help with his drug issues. Another participant was not doing well in group therapy sessions, so we modified his plan to include only individual sessions to see if that works better for him.

## **SUCCESS SO FAR**

The pilot program proved to be very successful. Our first mental health treatment participant successfully completed the program and graduated in May, and our first veteran graduated in June. Currently, there are five participants (three veterans and two mental health), nine candidates (three veterans and six mental health), three candidates denied participation by committee or trial prosecutor, and no one has failed to complete the program.

It has been a big win for our local community in tax-dollar savings, for graduate students receiving real-world counseling experience, and in reduced incarceration of veterans and those with mental health issues.

Currently, the 47th Judicial District Attorney's Office is in the process of expanding our program so that more defendants can access the treatment plans, get the support they need, and lighten the load on an already heavy-burdened criminal justice system. The future is very bright for our intervention program, and there is no reason why prosecutors in other jurisdictions cannot do something similar to what we have done. We took a vision and built a program the cowboy way: using what we had available. It took us some effort; but know that people are out there who can and will help. All you need to do is ask.

And that includes us. If you would like to start a community-based treatment program in your area, feel free to contact us with questions—we will be glad to help you.

Feel free to use the document samples in the sidebars in any way you wish, and don't forget to keep your white hat clean!

## **Sample Admonishments for the Veterans Treatment and Mental Health Pre-Trial Intervention Program**

### ***Standard Admonishments plus:***

1. You understand that you are entering a pretrial intervention program to focus on treatment to keep you out of the criminal justice system.
2. You have signed forms giving up rights and waiving privileges which include access to your medical records and so that the staffing committee can consult with your medical treatment provider to develop your treatment plan.
3. You are signing an agreement with the District Attorney's Office agreeing to follow the recommendations of the program for a year in order to have your case dismissed upon successful completion. However, all the paperwork you have signed can be used against you at your trial if you are removed from the program for violations or if you voluntarily choose to leave the program.
4. You will be on bond during the program. If you violate the terms of your agreement, a warrant can be issued for your arrest and can result in you being removed from the program.

### ***Findings:***

1. I find that you meet the requirements for entry into the Veterans Treatment and Mental Health Pre-Trial Intervention Program.
2. I find that you have entered into this agreement of your own volition and after consulting with your attorney.
3. I order you to follow all the conditions as recommended by the staffing committee and to successfully complete those requirements.
4. I accept your plea and your agreement with the District Attorney's Office.

# The PROSECUTOR

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## It's Time to Demand an End to Sex-buying

BY JR UJIFUSA

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AS A FORMER MEMBER of Multnomah County's Neighborhood Deputy District Attorneys program—and current member of Multnomah County's Human Trafficking Team—I work closely with several communities throughout Oregon. Overseeing the county's Sex Buyer Accountability and Diversion Program, I know firsthand how the crimes of prostitution and sex trafficking hurt these neighborhoods. I've seen the violence, drugs, and exploitation the illegal sex trade breeds, often in close proximity to our schools, businesses, and homes. But, while most prosecutors agree prostitution is a community problem that must be addressed on a local level, there's often much debate on how that can be achieved.

I have handled more than a thousand prostitution and sex trafficking cases over the past eight years. In that time it's become clear to me that the old way of addressing the issue—only arresting prostituted women and expecting it to solve the problem—is a dead-end. Too many times I've seen these women arrested, processed, and released, only to be back on the track or street corner within a matter of hours.

But running these women through a revolving door justice system isn't just inefficient, it can often be unjust. I've spoken with hundreds of prostituted people in my work, many are extremely vulnerable individuals that were forced into the sex trade by pimps, traffickers, or circumstance. For them the sex trade isn't about choice; it's about having no OTHER choices.

But there is one party in every commercial sex transac-

tion that has plenty of options: the sex buyers. These men have the power NOT to take advantage of others for their own gratification, and yet thousands of them seek out prostitution in Multnomah County, exploiting vulnerable people and funneling hundreds of thousands of dollars into the hands of gangs, pimps, traffickers, and other organized crime rings that are so deeply entrenched in this industry. Of course, policies to end sex trafficking must target traffickers and offer support to their victims—but a truly holistic approach to the problem must also hold sex buyers accountable for fueling this criminal enterprise. If they are arrested more often, and prosecuted more vigorously, it will have a greater impact on human trafficking than current efforts. For instance, fines collected from convicted buyers could provide funding for many anti-trafficking activities, including support services for victims. And when buyers face increased likelihood of arrest, and stiffer penalties when convicted, it will serve as a strong deterrent—scaring off current and potential buyers alike. In time the illegal sex trade becomes less profitable for traffickers, reducing their incentives to find and exploit their victims. As demand drops and profits dissipate, the marketplace—and all its inherent harms—are drastically reduced.

### OREGON DEMANDS A NEW APPROACH

One of my first child sex trafficking cases came in 2009. The victim was a young girl with a bright smile—she looked closer to 12 than her actual age of 14. By the time

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we found her she had been “in the game” for a few months. And though I was pleased with the fact that her trafficker saw justice, I still wanted to do more. Once her pimp was behind bars my mind turned to all the men who made an arrangement with him, who chose to enter a dingy hotel room, and even after seeing how young she was, bought her anyway. If not for them this girl would have never suffered the way she did. I wanted them held accountable for their role in her abuse. I wanted to stop the predatory industry that allowed her to become victimized in the first place. I realized then that as important as it is to go after traffickers, we will never truly eradicate trafficking until we’ve curbed the demand for paid sex in our community.

Fortunately I wasn’t alone in feeling this way.

Around the same time, Portland Police Bureau joined my office in adopting new ways for dealing with prostitution. Instead of treating women forced into the sex trade like criminals, we started recognizing them as potential crime victims and worked towards getting them out of the “life”. We also started targeting sex-buyers more aggressively to hold them accountable by arrest and prosecution, with encouraging results.

We began to see increased cooperation with the sex trade’s victims, opening up many investigations that would otherwise be deadlocked. Traditionally, it’s difficult to get a prostituted person to disclose anything about her pimp to police or prosecutors. There is a code of silence that can be difficult for law enforcement to crack. But we have found prostituted individuals are far more willing to offer up information on their buyers. At best they see these men as “walking wallets,” at worst they were men who abused and exploited them. Getting a victim to provide information on

her buyers is far easier than getting her to do the same against a pimp.

Buyers are also far more physically present in the sex trade. If a trafficker has “groomed” his victims well enough he can run a prostitution ring from across town—even out

of state—with great anonymity. The buyers, however, are present physically and online, often leaving a more visible trail for us to follow, leading to more arrests and convictions.

In fact, buyers are becoming increasingly more connected. All over the United States, high-frequency sex buyers—men who buy multiple times a month—are logging on to websites to interact and share information with each other on the illegal sex trade. These “john boards,” allow users to join clandestine networks where

they openly rate those they exploit, tell other buyers how they can gain access to secret brothels, and trade tips on avoiding police detection.

But, with the right monitoring, these boards can provide invaluable insight into their actions. Studying these websites helps prosecutors build cases against their jurisdiction’s most active buyers. These are men who fund a large portion of the local prostitution economy—targeting them and forcing them out of the market via arrest (or fear of arrest) can have a substantial effect on the volume of prostitution in an area. Focusing on high-frequency buyer networks is one of the most strategic and effective deterrents for prostitution I’ve ever seen, and one that I hope will spread throughout the entire country.

To learn more about successful efforts to take down up online sex-buying networks, contact JR at: [Glen.UJI-FUSA@mcda.us](mailto:Glen.UJI-FUSA@mcda.us)

*Of course, policies to end sex trafficking must target traffickers and offer support to their victims—but a truly holistic approach to the problem must also hold sex buyers accountable for fueling this criminal enterprise.*



# The PROSECUTOR

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## How Prosecutors Are Responding to Shifting Views on Marijuana

BY CHUCK SPAHOS AND ERIC ZAHND

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*Editor's note: This article was first published in Route Fifty as part of an ongoing series highlighting local criminal justice issues. Route Fifty is a digital news publication connecting the people and ideas advancing state, county and municipal government across the United States. Additional NDAA articles can be found at [www.routefifty.com](http://www.routefifty.com).*

**THE PUBLIC'S ATTITUDE** toward marijuana has shifted in recent years. It is now permissible in a majority of states to possess marijuana for purported medicinal reasons, and a growing number of states permit possession of marijuana for recreational use. Proponents of marijuana legalization are spending millions of dollars in other states to change laws prohibiting the possession and distribution of marijuana through voter referendums, and sometimes through the actual legislative process.

Yet it remains illegal under federal law to possess, cultivate, use, or distribute marijuana. Despite the fact that Congress has not changed the law, the Obama Administration directed federal law enforcement authorities not to enforce federal laws regarding marijuana in many circumstances. That decision effectively opened the door to states like Colorado, California, and others to permit sales of marijuana for purely recreational purposes and allowed many other states to continue to permit sales for purported medicinal reasons that are nevertheless prohibited by federal law.

All that could change under the Trump Administration. Attorney General Jeff Sessions has made no secret of the

fact that he believes marijuana is a dangerous drug. With a stroke of a pen, he could effectively reverse former Attorney General Eric Holder's hands-off approach to enforcement of federal anti-marijuana laws.

Despite these shifting views on marijuana from the public and government, state prosecutors were largely absent from the debate on the national stage. This was true even though the overwhelming majority of marijuana cases are handled by state and local prosecutors.

The National District Attorneys Association (NDAA), the nation's largest and oldest prosecutor organization, recently filled that void with the release of a 16-page report entitled "Marijuana Policy: The State and Local Prosecutors' Perspective."

The report was initially drafted by a working group of 27 prosecutors from across the nation, each of whom brought a unique perspective to the issue. Some of those prosecutors hailed from states where marijuana is legal to possess for recreational purposes under state law. Others were from states where possession of marijuana is legal for purported medicinal reasons. And still others work in states where marijuana laws more closely track federal law—meaning possession, cultivation, or distribution of marijuana remains illegal for any reason. While those prosecutors had varying opinions regarding marijuana, they forged a consensus on four important issues: consistent drug enforcement policy; support for marijuana research; the dangers of marijuana-impaired driving; and the importance of keeping marijuana away from children.

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*Chuck Spahos is the Executive Director of the Georgia Prosecuting Attorneys Council. Eric Zahnd is the Prosecuting Attorney for Platte County, Missouri.*

First, prosecutors believe that federal drug enforcement policy regarding the manufacture, importation, possession, use and distribution of marijuana should be applied consistently across the nation to maintain respect for the rule of law. While NDAA stopped short of taking a position on what the federal government's drug enforcement policy should be, prosecutors feel strongly that consistent enforcement is crucial.

Prosecutors observed that state laws that authorize the possession, production, use, and distribution of marijuana are subject to preemption by federal drug laws that prohibit those same activities. Marijuana has been listed as a Schedule I drug since Congress first passed the Controlled Substances Act (CSA) in 1970. Schedule I drugs are considered to have a high potential for abuse, no currently accepted medical use, and lack accepted safety for use under medical supervision. Multiple requests to move marijuana from Schedule I, including one as recently as 2016, have been rejected by the federal Drug Enforcement Agency (DEA).

*While NDAA stopped short of taking a position on what the federal government's drug enforcement policy should be, prosecutors feel strongly that consistent enforcement is crucial.*

The Supremacy Clause of the United States Constitution dictates that federal law preempts state law. Accordingly, while a state may choose not to criminalize marijuana, a state law that affirmatively authorizes the production, distribution, and use of marijuana is subject to preemption by the federal laws to the contrary. Preemption issues—which are already being litigated—could become particularly troublesome if the federal government chooses to enforce the CSA's ban on marijuana in states that have allowed production, distribution, or use of marijuana for recreational or purported medicinal purposes.

Second, prosecutors voiced their strong support for ongoing research into medicinal uses of marijuana and its

derivatives, carried out in a consistent manner with federal law. The NDAA report specifically lauded the existing efforts by the National Institute of Drug Abuse (NIDA) to increase the amount of research-grade marijuana available to fill researchers' needs as well as the Food and Drug Administration (FDA) waiver program for researchers conducting clinical trials on one of marijuana's components that is showing promise, cannabidiol (CBD). Prosecutors also called for additional research to quantify the adverse effects of marijuana use on driving and to set standards for driver impairment.

Third, prosecutors called attention to the growing problem of marijuana-impaired driving. Data from the National Highway Traffic Safety Administration's (NHTSA) 2013–2014 roadside survey of weekend nighttime drivers showed that 8.3 percent had some alcohol in their system and 12.6 percent tested positive for THC—an increase of 48 percent from that number in 2007.

Given that a majority of states have legalized marijuana for medical or recreational use, marijuana-impaired driving cases will continue to present unique challenges for prosecutors. While it is beyond dispute that marijuana impairs cognitive function, driving performance, and increases crash risk, scientific studies have not yet settled on a “per se” level of marijuana similar to the 0.08 blood alcohol standard for impaired driving legislation.

Fourth, one of the most significant concerns about the increasing availability of marijuana is its access to youth. The science is clear that use of marijuana during adolescence adversely affects brain development, particularly the part of the brain that regulates complex cognitive behavior, personality expression, decision making and social behavior.

Prosecutors observed that youth who use marijuana are at greater risk of using other illegal drugs. For example, a study by Columbia University's National Center on Addiction and Substance Abuse indicates that teens that use marijuana at least once a month are 13 times more likely than other teens to use another drug like cocaine, heroin, or methamphetamine.

Marijuana policy in the United States has evolved over the years, and enforcement of that policy has varied from administration to administration. What has not changed is the mission of prosecutors to protect the communities they serve. Part of that mission involves engaging in legal and policy discussions despite an ever-changing landscape, including on the subject of marijuana. NDAA's recent report puts prosecutors on the map on this rapidly-evolving issue.

## Journalists Grieve Death Of Forensic Science Commission



BY JOHN M. COLLINS, JR.

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*Editor's note: This article was first [published in Science 2.0.com](#). Science 2.0 was created in 2006 by ION Publications LLC to modernize science communication, publishing, collaboration and public participation.*

**THE NATIONAL COMMISSION** on Forensic Science was dissolved by Attorney General Jeff Sessions in a decisive action that brought an end to a highly decorated body of professionals, but one that was frequently stymied by legal gamesmanship and discord. The commission, a precipitant of the Obama administration's criminal justice reform efforts, was curiously loaded with trial attorneys, law professors, and other academicians but relatively few forensic scientists.

Now that the commission has disbanded, a journalistic rebuke of AG Session's decision is underway in full force. News outlets including The New York Times have strongly criticized Sessions for his supposed dereliction of duty. Media outrage seems directed toward a ghostly assumption that the commission's demise is somehow, somehow an endorsement of what the press have come to believe is an incompetent and malfeasant profession of forensic science that pervasively dooms innocent defendants to prison—or worse.

The notion that America's forensic science commu-

nity is mired in malpractice and misconduct is a myth perpetuated for over 20 years by O.J. Simpson defense attorneys Barry Scheck and Peter Neufeld, who cofounded the Manhattan-based Innocence Project in 1991. The Innocence Project is an academic legal clinic in which law students and faculty review claims of innocence submitted by convicted prisoners, then seek exonerations in those cases that warrant it.

Scheck and Neufeld gave rise to an entire industry aimed at securing exonerations for which damages can later be sought through litigation, sometimes to the tune of several millions of dollars. Each exoneration has the potential to produce a cash windfall for the attorneys on the case, just as it did in 2014 when five convicted Illinois men were awarded \$40 million. And, of course, it also produces real-life drama that makes for great news—a sort of Shawshank phenomenon, if you will, that smitten American journalists have become addicted to over the last two decades. Scheck, Neufeld, and their peers have rarely disappointed, and they've used their media momentum to underwrite an aggressive public policy campaign to reform the American criminal justice system as they see fit.

Among the most formidable barriers to this campaign has been forensic science, which has the effect of

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*John M. Collins, Jr. is an internationally distinguished expert on forensic science and scientific evidence.*



raising public confidence in the administration of justice. Generally speaking, forensic science has earned tremendous public respect over many decades. Unfortunately for activists who must ultimately deflate public confidence in American justice to advance their reforms and win their exonerations, forensic science has been a thorn in their side.

Peter Neufeld was a member of the National Commission on Forensic Science. In a story published by the Washington Post on April 10, 2017, Neufeld was quoted as saying “the [Justice] department has literally decided to suspend the search for the truth. As a consequence innocent people will languish in prison or, God forbid, could be executed.”

Writing for the Post, Spencer Hsu, a frequent mouthpiece for the Innocence Project and the anti-forensic science campaign, sought to buoy Neufeld’s remarks by noting that “nearly half of 349 DNA exonerations involved misapplications of forensic science.” It is a figure commonly cited by the Innocence Project but one that is so stunningly inaccurate as to be disturbing.

Neufeld’s comments in the Washington Post, and the journalistic activism that allowed them to go unchallenged, are indicative of why the National Commission on Forensic Science is now relegated to a historical footnote.

The exoneration of innocent people is an honorable cause. Our criminal justice system is imperfect and sometimes abusive in its treatment of defendants, especially those who are burdened by mental and socioeconomic challenges. But to this day, not a single American journalist has undertaken the daunting task of critically scrutinizing the methods and rhetoric of the Innocence Project nor the many public policy ini-

tiatives, including the National Commission on Forensic Science, that were born as a result.

What has not been reported is the impressive advancement of forensic science over the last 40 years, in part due to increased educational standards, more robust quality assurance systems, and the accreditation of laboratories based on the ISO 17025 international standard for testing and calibration laboratories. With over three million cases a year being processed in America’s crime laboratories, and despite a painful scarcity of fiscal resources, an impressively small percentage of forensic tests ever result in a serious problem. This is not a revelation, however, that will sell newspapers. What does sell newspapers is portraying every instance of failure, no matter how isolated it may be, as being representative of all work performed by forensic science professionals across the United States.

The National Commission on Forensic Science had potential. There is room for improvement in forensic science and more work needs to be done—and will be done. But the commission was long-ago hijacked by articulate and often combative legal activists who had little interest in helping forensic science. Instead, they used the commission and taxpayer resources to perpetuate a myth that forensic

science is fraudulent and void of scientific validity. And, God only knows, if forensic science is unreliable, what else must be wrong with the American criminal justice system?

It is the perfect narrative upon which to build a multi-million dollar exoneration industry, which has now lost one of its greatest assets—the National Commission on Forensic Science.

*Media outrage seems directed toward a ghostly assumption that the commission’s demise is somehow, someway an endorsement of what the press have come to believe is an incompetent and malfeasant profession of forensic science that pervasively dooms innocent defendants to prison—or worse.*

# The PROSECUTOR

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## PART ONE

# *Police Body-Worn Cameras:* What Prosecutors Need to Know

BY KRISTINE HAMANN

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### INTRODUCTION

AS POLICE DEPARTMENTS across the United States embrace the use of police body-worn cameras (BWCs), it is imperative that prosecutors be involved in the process as early as possible. The cameras will inevitably capture a great deal of evidentiary material that will be used in every type of criminal prosecution. Thus, systems and policies must be developed to ensure that this evidence is properly captured and delivered to the prosecutor in a timely and usable way. This can be a daunting task, complicated by the fact that in most jurisdictions, there are many police departments that send their cases to one prosecutor. Without coordination, the departments may purchase different technologies, implement different policies, and store the data in different locations. In some instances, the prosecutor may even be unaware that a police department has purchased BWCs. To start, the prosecutor should reach out to their police department(s) to determine whether they are planning to purchase BWCs. If the police department already has a program underway, it will be

advantageous for the prosecutor to become involved in developing the program and in coordinating with other police departments in their jurisdiction.

This article is a guide to assist prosecutors in navigating the many complex issues surrounding a BWC program. It is divided into two parts: (i) BWC Technology and (ii) Prosecutor-Specific Considerations. Part One, BWC Technology, provides an overview of BWC technology and the systems in use by various police departments. This section discusses the technical specifications of BWC devices and supporting software and storage systems, and issues that this technology poses for prosecutors and law enforcement. Part Two, Prosecutor-Specific Considerations, discusses prosecutorial issues related to BWCs, such as developing office policies, access to recordings, discovery considerations, and the use of BWC recordings as evidence in the grand jury and at trial.

The law governing the use of BWCs and BWC recordings may vary by jurisdiction and this article is not intended to offer legal advice for any jurisdiction, but rather to identify issues that may be relevant to considerations of the use of BWCs and BWC recordings.

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*Kristine Hamann is the Executive Director of the Prosecutor's Center for Excellence. Extensive research and writing assistance was provided by contributing authors from White & Case LLP, including partner Daniel Levin and associates Jeremy Apple, Lexie Calistri, Micaela Glass, Russell Gould, Iesha Nunes and Andrei Popovici.*

# Body-Worn Camera Technology



## SYSTEM CAPABILITIES

It is important for prosecutors to know the capabilities of the BWCs used by their police departments. The strengths and limitations of the technology behind the cameras may become an issue during investigations and trials. Some of the technical issues include:<sup>1</sup>

■ **Battery Life:** The battery life of a BWC should allow the camera to function for an entire shift without having to be recharged. The camera does not run continuously, but instead is turned on and off by the officer as required by police policy. On average, an officer records between two to three hours during the course of an eight-hour shift. Ten or 12-hour shifts require longer battery life.

■ **Field of View:** The horizontal field of view of a BWC is typically between 90 and 130 degrees. A wider angle lens may capture more of a particular scene, but video may become distorted and less detailed as the lens angle increases (such as when looking through a fisheye lens). Also, a wide angle lens may capture more information than the officer is capable of seeing with his or her own eyes and the recording may create a false expectation of what the officer should have been able to see.

■ **Night Vision:** Though some BWCs come with a night vision option, police do not often purchase this feature. The concern, as with a wide angle lens, is that the camera will record more than the officer can naturally see and that the recording may create a false expectation of what the officer should have been able to see.

■ **On-Scene Playback:** Some BWC systems allow the officer to play the recording while still in the field. This is usually done through a smart phone that is connected to the BWC. This capability is typically combined with tamper-resistant technology that prevents recordings from being deleted, edited or overwritten until transferred from the BWC.<sup>2</sup> This playback often assists the officer in tagging a particular incident with information that will allow easy retrieval at a later time.

■ **Buffering:** Buffering refers to the capability that some cameras provide to capture several minutes of video and audio before the officer activates the recording. Buffer time may vary by department due to the storage capacity and battery life of a given department's BWCs.<sup>3</sup> Typical buffering is 30 seconds to two minutes of recording with no sound.<sup>4</sup> Buffering provides information about what was happening just before the officer activated the BWC.

<sup>1</sup> See HOME OFFICE CTR. FOR APPLIED SCI. & TECH., BODY-WORN VIDEO TECHNICAL GUIDANCE 6 (2014), available at <https://www.bja.gov/bwc/pdfs/body-worn-video-technical-guidance-1414.pdf>; *Operating Characteristics and Functionality Descriptions of Body Worn Cameras*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/law-enforcement/exhibits/Pages/body-worn-camera-operating-characteristics.aspx> (last visited Jan. 17, 2017); for more specifics about body worn camera technology see Vivian Hung, Steven Babin, Jacqueline Coberly, *A Market Survey on Body Worn Camera Technologies*, NATIONAL INSTITUTE OF JUSTICE, (May 2016), <https://nij.gov/publications/Pages/publication-detail.aspx?ncjnumber=250381>; see also *A Primer on Body-Worn Video Cameras for Law Enforcement Assessment Report*, NAT'L INST. OF JUSTICE, 15 (Sept. 2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

<sup>2</sup> See HOME OFFICE CTR. FOR APPLIED SCI. & TECH., *supra* note 1, at 4; *Operating Characteristics*, *supra* note 1.

<sup>3</sup> James R. Benjamin et. al, MAYOR RAWLINGS-BLAKE'S WORKING GROUP ON THE USE AND IMPLEMENTATION OF BODY-WORN CAMERAS: DRAFT RECOMMENDATIONS 6, 22 (2015), available at <http://mayor.baltimorecity.gov/sites/default/files/20150218BWCWorkingGroupRecommendations.pdf>.

<sup>4</sup> See TASER INT'L, Axon Body Camera Manual 7 (2014), available at [https://prismic-io.s3.amazonaws.com/tasr/%2Fecbc6e1a-2f29-4282-b25e-c7473bd1c586\\_axon-body-user-manual.pdf](https://prismic-io.s3.amazonaws.com/tasr/%2Fecbc6e1a-2f29-4282-b25e-c7473bd1c586_axon-body-user-manual.pdf).



■ **Average File Size:** The average file size of a two-hour BWC recording is about four (4) gigabytes. This is about the same size as a feature film.<sup>5</sup>

■ **Docking System:** Although technology is evolving to allow for uploading video in the field, most BWCs come as a system that includes an accompanying “docking station.”<sup>6</sup> Docking stations charge the BWC unit, and the higher-end systems also transfer or upload digital recordings to servers or cloud-storage.<sup>7</sup> For most models of BWCs, an officer will place the camera unit in a docking station when returning to the department upon completion of a shift.<sup>8</sup> If the video clips have not been previously categorized or tagged, the officer or another member of the department can do so at this point in the process.<sup>9</sup>

■ **Compression:** In order to extend the battery life of the BWC and reduce the data storage required for a video image, digital video typically undergoes a compression process that removes redundant data in the video file.<sup>10</sup> Compression is achieved through the use of a codec: a compression-decompression algorithm that controls the compression/decompression and/or the encoding/decoding of audio and video files. Compressing video may cause a short time lag that may result in a very small amount of lost footage.<sup>11</sup> BWC systems typically incorporate MPEG-4, H.264 or H.265 compression. H.265 compression is a relatively new standard that improves upon H.264 compression by further reducing storage needs while maintaining viewing quality.<sup>12</sup>

■ **Photo Capability:** A BWC may have the ability to take still photos. If so, the prosecutor should learn how to obtain these photographs in addition to the video recordings.<sup>13</sup>

■ **Video Standard:** A BWC typically will export video

to a standard, accessible video file format such as MPEG-4, AVI or MOV without requiring special plug-ins or software to convert the file to a readable format.<sup>14</sup> It is critical for the prosecutor to determine whether the BWC recordings are in a format that can be viewed and stored by equipment and computer systems in the prosecutor’s office.

■ **Audit Trail—Safeguards to Prevent Copying or Altering BWC Video:** In most systems, an officer will have no ability to delete a BWC recording once it has been captured.<sup>15</sup> Many body-worn camera models offer various safeguards to ensure that the data is not manipulated.<sup>16</sup> Some BWC systems have a password security system that controls access to the recordings and provides an audit trail of who has viewed, changed or deleted a recording. BWC systems such as the AXON Body by TASER International forbids users from deleting a video on the camera and marks the video with a security hash value, which is used to verify that the video has not been tampered with.<sup>17</sup> Similarly, the FirstVu HD BWC from Digital Ally offers optional software that logs each use of the video and generates a chain-of-custody report.<sup>18</sup> Ideally, BWC recording systems should capture the device serial number, user identification, device events (turning on and off), the time at which any BWC recording is viewed on the system, the user viewing the recording, the duration of view, and log any instances of copying, tagging or sharing.<sup>19</sup>

■ **Police Review Restrictions and Redaction:** Police officers and those with access to BWC recordings will typically be able to produce copies of original BWC recordings as needed for analysis or redaction purposes, leaving the original recording unaltered. In certain jurisdictions, police departments designate specified personnel as the only individuals with access to BWC recordings and copying privi-

<sup>5</sup> See *Operating Characteristics and Functionality Descriptions of Body Worn Cameras*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/law-enforcement/exhibits/Pages/body-worn-camera-operating-characteristics.aspx>.

<sup>6</sup> *Id.* at 3, 11. See also *BodyWorn, The Smartest Police Body Camera Worn in the World* at <http://utility.com/perch/resources/bodywornbrochure-1.pdf> (describes uploading from the field).

<sup>7</sup> See, e.g., *id.* at 3; WASH. ASSOC. OF PROSECUTING ATTORNEYS BEST PRACTICES COMM., *USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT: CONSIDERATIONS, ISSUES AND CONCERNS*, 3 (2015), available at <http://pceinc.org/wp-content/uploads/2015/07/Washington-Link-1.pdf>.

<sup>8</sup> For example, the “Wolfcom Vision Pro” BWC, sold by Wolfcom Enterprises, enables the officer to attach the camera to its docking station. See *Wolfcom*, WOLFCOM ENTERPS. [http://www.wolfcomusa.com/wolfcom\\_vision\\_police\\_body\\_worn.html](http://www.wolfcomusa.com/wolfcom_vision_police_body_worn.html) (last visited Jan. 18, 2017).

<sup>9</sup> Greg Hurley, *Body-Worn Cameras and the Courts*, 4 (2016), available at <http://www.ncsc-jurystudies.org/~media/files/pdf/jury/final%20bwc%20report.ashx>.

<sup>10</sup> DEP’T OF HOMELAND SECURITY, *BODY-WORN VIDEO CAMERAS FOR LAW ENFORCEMENT ASSESSMENT REPORT*, 2, [https://www.dhs.gov/sites/default/files/publications/Body-Worn-Cams-AR\\_0415-508.pdf](https://www.dhs.gov/sites/default/files/publications/Body-Worn-Cams-AR_0415-508.pdf).

<sup>11</sup> See Martha Wolf, *Compressing Digital Video*, UNIV. OF TEX. AT AUSTIN, <http://www.edb.utexas.edu/minliu/multimedia/PDFfolder/CompressingDigitalVideo.pdf>.

<sup>12</sup> See *Operating Characteristics*, *supra* note 1.

<sup>13</sup> Certain types of BWCs allow officers to take still photos, as well as video recordings, both of which can be stored by police departments. *A Primer on Body-Worn Video Cameras for Law Enforcement Assessment Report*, NAT’L INST. OF JUSTICE, 15 (Sept. 2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

<sup>14</sup> See generally SENSOR, SURVEILLANCE, AND BIOMETRIC TECHS. CTR. OF EXCELLENCE, *BODY WORN MARKET CAMERA SURVEY* (Mar. 2014), <https://www.justnet.org/pdf/Body-Worn-Camera-Market-Survey-508.pdf>.

<sup>15</sup> Hurley, *supra* note 9, at 4.

<sup>16</sup> Alexandra Mateescu, et al., *POLICE-WORN BODY CAMERAS*, Data & Society Research Institute 6 (2015), available at <http://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Vivian Hung, Steven Babin, Jacqueline Coberly, *A Market Survey on Body Worn Camera Technologies*, NATIONAL INSTITUTE OF JUSTICE, (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250381.pdf>.

leges.<sup>20</sup> Prosecutors should take steps to understand their law enforcement agency’s system for documenting who, when, and why a BWC recording is accessed or copied.

■ **Audit Trail for Prosecutors and Defense Attorneys:** Some BWC systems allow the police to verify whether a prosecutor has viewed a recording. Similarly, the system may be configured to permit the prosecutor to verify whether a defense attorney has viewed the recording. Prosecutors must take care not to use the audit trail as a method to uncover a defense strategy; for example, an audit trail may show the defense viewing one recording repeatedly, thus revealing an interest in a file that may be relevant to a particular defense.

■ **Integration with Dispatch, Records Management and Dash Camera System:** Technology has evolved that integrates recording and data produced by BWC systems with

pre-existing police dispatch, event records management and dashboard camera systems. These technologies embed the BWC recording with an incident number from a dispatcher, and link the corresponding BWC recording with the department’s records management system, along with any dashboard camera footage. When implemented effectively, these capabilities can improve the ability to locate relevant recordings, and may reduce the need to manually tag a file as a relevant recording.<sup>21</sup>

■ **Search Capability:** Although some systems can search for recordings, this feature is dependent on the data and tagging associated with recordings. A robust search function will ease the task of identifying BWC recordings. Ideally, the recordings should be able to be searched by officer, incident number, date, time, and location.

■ **Synchronizing Recordings:** If there are multiple offi-

### Case Study—System Capability Recommendations and Common Product Specification

	Department of Homeland Security <sup>22</sup>	Phoenix Police Department <sup>23</sup>	Baltimore Working Group Recommendations <sup>24</sup>	TASER Axon Flex Product Specifications <sup>25</sup>
<b>Image resolution</b>	At least 640 x 480 pixels (VGA)	N/A	1280 x 720 pixels (HD 720P)	640 x 480 pixels (VGA)
<b>Frame rate</b>	At least 25 frames per second	N/A	N/A	At least 30 frames per second
<b>Battery Life</b>	At least 3 hours while continuously recording	At least 8 hours (some of which is in standby mode and some recording)	At least 10 hours (some of which is in standby mode and some recording)	At least 4 hours of recording time
<b>Onboard storage</b>	At least 3 hours	At least 4 hours	N/A	N/A
<b>Visual effects<sup>26</sup></b>	Low lux rating	Optional night vision capability	Low-light capability	Low light capability <sup>27</sup>
<b>Field of Vision</b>	Wide angle field of vision, at least 75 degrees (Note: this may distort the video)	At least 50 degree field of vision	Wide angle field of vision (Note: this may distort the video)	Wide angle field of vision, at least 75 degrees (Note: this may distort the video)
<b>Metadata<sup>28</sup></b>	N/A	Video time and date stamp	Video time and date stamp	ID, title and retention category <sup>29</sup>
<b>Miscellaneous</b>	N/A	Visible recording indicator	N/A	N/A

<sup>20</sup> Antonia Merzon et al., *Body-Worn Cameras: A Report for Law Enforcement*, COLO. DIST. ATTORNEYS’ COUNCIL 7 (2016), [http://www.cdacweb.com/Portals/0/LandingPageContent/BP\\_Body\\_Cam\\_Report.pdf](http://www.cdacweb.com/Portals/0/LandingPageContent/BP_Body_Cam_Report.pdf).

<sup>21</sup> See Lindsay Miller et al., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 34 (2014).

<sup>22</sup> Tod Newcombe, *For the Record: Understanding the Technology Behind Body Worn Cameras*, DIGITAL COMMUNITIES, 32 (Sept. 2015), available at [https://drjdbij2merew.cloudfront.net/DC/DC\\_Mag\\_Sep15.pdf](https://drjdbij2merew.cloudfront.net/DC/DC_Mag_Sep15.pdf); *A Primer on Body-Worn Video Cameras*, *supra* note 13, at 11, 13.

<sup>23</sup> Newcombe, *supra* note 22, at 32-33.

<sup>24</sup> Benjamin et al., *supra* note 3, at 35-36.

<sup>25</sup> *A Primer on Body-Worn Video Cameras*, *supra* note 13, at 15.

<sup>26</sup> Most departments have opted for systems that record what the human eye can see and no more (e.g., no low-light visibility, night vision, etc.).

<sup>27</sup> TASER INT’L, INC., TASER AXON BODY CAMERA USER MANUAL, 4 (2014), [https://taser.cdn.prismic.io/taser%2F61becff6-108d-4e8b-8e66-0d84389bafc9\\_axon-flex-user-manual.pdf](https://taser.cdn.prismic.io/taser%2F61becff6-108d-4e8b-8e66-0d84389bafc9_axon-flex-user-manual.pdf).

<sup>28</sup> DEP’T OF HOMELAND SECURITY, *supra* note 10, at 3.

<sup>29</sup> *Tagging Recorded Evidence Files*, TASER AXON, <https://help.taser.com/hc/en-us/articles/221367868-Tagging-recorded-evidence-files> (last visited Jan. 19, 2017).

cers recording the same event at the same time, there should be a way to synchronize the recordings so they can be viewed together following the same timeline. This will allow for a more holistic view of a particular event.

## TAGGING AND METADATA

Prosecutors should seek to provide input as to how BWCs are identified, or “tagged,” with information connecting the recording to a particular incident of evidentiary value. Prosecutors do not have the resources to review all recordings in order to find relevant materials.

■ **Tagging:** “Tagging” is the process by which police officers manually assign certain data to BWC recordings in the form of text “tags.” These tags can catalogue each clip and assist in storing and retrieving the recording. The process of tagging allows an officer to classify and categorize certain BWC recordings that are potentially relevant for an enforcement matter. Tagging can be done in a variety of ways. Some departments require their officers to tag their recordings while in the field, while others assign the officer or other staff to tag the recording at the end of the officer’s shift. Technology is under development that may allow some tagging to be done automatically. Regardless of how tagging is conducted, the process is critical for police officers and prosecutors to quickly identify the relevant portions of recorded footage from a BWC upload, which may contain hours of irrelevant footage captured throughout an officer’s shift. The tagging of the recording usually determines the retention time of the recording. Each relevant recording should be tagged with the following information:

▶ *Evidentiary vs. Non-Evidentiary:* At its most basic level, the officer should identify what portions of a recording are considered evidentiary and, therefore, should be retained for a prosecutor’s review. Non-evidentiary recordings are recordings where the officer is not involved in any law enforcement activity, such as, for example, a routine patrol where there is no criminal activity. Recordings that are tagged as evidentiary will be retained for longer periods of time depending on pre-determined retention policies.

▶ *Camera ID number:* Some officers are personally assigned a BWC, while others share a camera. Knowing the camera identification number may assist in determining which officer made the recording.

▶ *Name and personnel number of the officer who made the recording.*

▶ *Date and time of the recording.*

▶ *GPS Coordinates:* Not every BWC recording will include GPS coordinates. GPS coordinates associated with the recordings may assist in identifying all of the officers

who were present and recorded at a particular time and place.

▶ *Incident Number:* The police incident number associated with the recording should be included with the BWC data. Prosecutors should work with police departments to ascertain identifying numbers that are useful in both the police department and prosecutor case management systems. For example, an indictment number may not be used in a police department system and is, therefore, not a common identifying number; however, a police incident/arrest number is often used in both prosecutor and police department systems.

▶ *Incident Location:* Because not all BWCs are equipped with GPS technology, police officers will tag BWC recordings with an incident location pursuant to that department’s standard protocol for location identification. Standardization of protocols for location identification within police departments is important for prosecutors to accurately identify the location of an incident, as well as to assist in identifying which officers were at a scene. Unfortunately, it is common for addresses to be entered in a variety of ways. For instance, one officer may enter a building number, while another officer may only include the street intersections of the same address. Unless a common incident number is also added, a program may be needed to coordinate the addresses that are entered in varying ways.

▶ *Type of Incident:* The officer should categorize the type of incident recorded, for example, as a citizen contact, a Terry stop, an arrest, a use of force incident, a consensual search, a non-consensual search, or a search warrant.

▶ *Type of Crime:* The officer should identify the type of crime associated with a BWC recording. This will often determine the retention time of the recording. For example, a recording of a felony will be retained for a longer period than a recording of a misdemeanor.

▶ *Privacy Flag:* Some BWC policies require an officer to tag or flag portions of a recording where video content implicates potential privacy concerns.<sup>30</sup> Many BWC policies allow the recording of highly sensitive events, such as testimony of a sex crime victim. This tag would serve as an alert that the recording may need to be redacted if released publically.

▶ *Number of Recordings:* There will often be multiple recordings for a single case. Even if one officer responds to an incident, the officer may turn the camera on and off, thereby creating multiple recordings. This is amplified when there are multiple officers on the scene. Indeed, it is not uncommon to have 20 to 30 recording snippets for a single case. The recordings should be properly tagged with the

<sup>30</sup> See WASH. ASSOC. OF PROSECUTING ATTORNEYS BEST PRACTICES COMM., *supra* note 7, at 5; see also Benjamin et al., *supra* note 3, at 7, 24 – 25.

## Case Study—Tagging

■ **Tagging with a Smartphone:** Several vendors provide a service that allows officers to review and tag their recordings in the field using a smartphone application that prevents altering or tampering with the video.<sup>31</sup> With this application, officers can instantly replay the recording and tag GPS and metadata to the videos.<sup>32</sup>

■ **New Jersey Attorney General:** To address privacy concerns, New Jersey requires every department that deploys BWCs to establish and implement a system permitting tagging when the recording: (1) captures the image of a victim of a criminal offense; (2) captures the image of a child; (3) was made in residential premises, a school or youth facility, a healthcare facility or medical office, a substance abuse or mental health treatment facility, or a place of worship; (4) captures a conversation with a person whose request to de-activate the BWC was denied; (5) captures a special operations event or execution of an arrest and/or search warrant where confidential tactical information may have been recorded; (6) captures the image of an undercover officer or confidential informant; or (7) captures the screen of a police computer monitor that is displaying confidential, personal or law enforcement sensitive information.<sup>33</sup>

same incident number, so that all recordings from a single incident are kept together.

▫ **Multiple Police Departments:** Particularly in serious cases, officers from multiple departments responding to a scene may all be wearing BWCs. Prosecutors should work with departments within their jurisdictions to develop a system for gathering the requisite recordings when several departments respond to one incident.

▫ **Metadata:** BWC recordings will contain certain digital identifiers known as metadata, which are automatically collected and stored by the BWC system when recorded. Ideally, metadata in BWC recording files will include the date and time of the recording, GPS coordinates, agency name, unique unit and/or officer IDs and, possibly, associated case numbers. BWC metadata can be used by prosecutors to preserve and maintain a record of officer activity and response, ensure a valid chain of custody, and authenticate a recording or video file. Similarly, unit

and officer identification-related metadata and GPS metadata may be useful for prosecutors to determine the precise location of an incident or identify the particular officers present at a scene.

▫ **Lack of Tagging:** Sometimes a BWC recording will have no identifying information, or limited available information may be inaccurate. The prosecutor will need to coordinate with the police department about how to identify recordings without tagging and to ensure that in the future, lapses in tagging are corrected. This can be extremely time-consuming.

## SYSTEM COSTS FOR THE POLICE

BWC systems, including the camera, docking station, and a cloud-storage package, can be expensive.<sup>34</sup> Cameras alone range in cost from \$150 to \$1,000, though most average around \$300 to \$500 per unit.<sup>35</sup> Docking stations can cost between \$500 and \$3,000 per unit.<sup>36</sup> Data storage entails additional costs, either in the form of subscription fees for cloud services, or an up-front purchase of additional equipment, and ongoing payments for staff and maintenance of storage systems.<sup>37</sup>

## STORAGE

A central consideration for prosecutors utilizing BWC video is how BWC recordings are captured and uploaded from the officer's BWC device, and stored for later use. Each law enforcement agency utilizing BWCs will store BWC video recordings in accordance with the technologies implemented by that agency. The storage location for BWC recordings is largely determined by the BWC system purchased by the department. Generally, BWC systems are configured to store video recordings either on local servers or hard drives, or in a cloud-based storage system. Prosecutors should take steps to identify and understand the law enforcement policies and technologies implemented to ensure the integrity and proper handling and storage of BWC recordings.

■ **Storage, Retention and File Integrity:** A reliable system must be enabled to retain data for the duration of the statutory or regulatory period, delete the data upon the expira-

<sup>31</sup> Merzon, *supra* note 20, at 8, n.11; Axon View, AXON, <https://www.axon.io/products/view>.

<sup>32</sup> Axon View, *supra* note 31; see also Vivian Hung, Steven Babin, Jacqueline Coberly, *A Market Survey on Body Worn Camera Technologies*, NATIONAL INSTITUTE OF JUSTICE, 5-84, (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250381.pdf>.

<sup>33</sup> Attorney General of New Jersey, LAW ENFORCEMENT DIRECTIVE NO. 2015-1 18-19 (July 28, 2015), available at [http://www.nj.gov/oag/dcj/agguide/directives/2015-1\\_BWC.pdf](http://www.nj.gov/oag/dcj/agguide/directives/2015-1_BWC.pdf).

<sup>34</sup> Hurley, *supra* note 9, at 3.

<sup>35</sup> *Body Camera Report*, COUNCIL ON LAW ENFORCEMENT AND REINVENTION 2 (2016), [http://www.michigan.gov/documents/clear/Body\\_Camera\\_Report\\_510729\\_7.pdf](http://www.michigan.gov/documents/clear/Body_Camera_Report_510729_7.pdf); Newcombe, *supra* note 22, at 38.

<sup>36</sup> COUNCIL ON LAW ENFORCEMENT AND REINVENTION, *supra* note 35, at 2; Tod Newcombe, *supra* note 22, at 38.

<sup>37</sup> Miller et al., *supra* note 21, at 32; Grant Federicks, *Cost of Ownership of Body-Worn Video*, THE POLICE CHIEF 83, IACP (May 2016).



## Case Study—Costs of BWC Storage and Equipment

### California

■ *Los Angeles*: In 2016, the Los Angeles City Council approved a \$69.6 million plan to equip 7,000 LAPD police officers with BWCs by the end of 2017. The expected cost includes a \$31 million contract with Taser International for a supply of BWCs, uploading equipment, and data storage and management. The remainder of the money will be used to pay for supporting costs, including LAPD personnel to review and manage footage.<sup>38</sup>

### Ohio

■ *Cincinnati*: In 2016, the Cincinnati Police Department finalized a seven-year, \$5.5 million contract with TASER International, which includes the cost of approximately 700 BWCs, docking stations, review software and cloud storage.<sup>39</sup>

### Maryland

■ *Baltimore*: In 2014, Baltimore city officials estimated video storage would cost as much as \$2.6 million annually for its 2,960 officers.<sup>40</sup>

### Michigan

■ In 2016, the Michigan State Police estimated that its BWC program would cost the department \$72 to 96 million per year for storage.<sup>41</sup>

tion of that period, and restrict unauthorized users from viewing, editing, or removing footage.<sup>42</sup> Generally, BWC technologies are configured to generate a “read only” of the original version of the video footage that may not be edited or tampered with. The original BWC recordings are then typically stored in a physically or digitally secure location pursuant to agency retention guidelines. Any necessary redactions should be made to editable copies of the original BWC recording, and not to the original file.<sup>43</sup>

■ **Disk and Local Storage:** Law enforcement agencies that are relatively small or those with limited BWC programs are likely to generate fewer BWC recordings. Often, such organizations establish a system in which BWC videos are saved to a local hard drive and subsequently recorded

onto CD-ROMs or DVDs for delivery to the prosecutor. It is important for the police to coordinate with the prosecutor to make sure they have the proper equipment to view the DVDs. More technologically advanced organizations may upload BWC recordings to centralized local servers used to store digital BWC footage captured by each precinct or district. However, over time, local hard drives and servers may reach their storage capacity, which will require the police department to develop solutions to archive video data, such as by (i) implementing offline storage for long term retention, (ii) shortening default retention policies (particularly for non-evidentiary videos),<sup>44</sup> or (iii) copying recordings to CD-ROMs or DVDs, and subsequently deleting digital files from the hard drive or server.<sup>45</sup>

■ **Benefits of Local Storage Systems:** The server is controlled by the local department and the data does not reside with a private vendor. The security of a local server may be easier to control, as fewer individuals have access to the system. In some instances, the local server may be cheaper than a cloud-based solution since there are no monthly fees and no need to increase the bandwidth of existing networks. The creation of a DVD for delivery to the prosecutor is similar to the delivery of a police report. It can simply be included in the prosecutor’s file and used in court.

■ **Downsides of Local Storage Systems:** As a BWC program expands, the local server may be overwhelmed with data. Failure of the server may also lose all stored data, unless a robust backup system is in place. Furthermore, a local server will require administrative staff to maintain the technology and to create DVDs for the prosecutor.

■ **Cloud-Based Systems:** Larger agencies generally have greater file storage and access demands. Depending on the size of the police department, however, the costs of storing BWC data can be staggering, and using in-house servers can be cost-prohibitive. Many vendors, such as TASER, VIEVU, Motorola, and Digital Ally have implemented the use of off-site, privately owned, cloud-based systems specifically designed for BWC recordings that include, among others, Microsoft Azure Government cloud storage services or Amazon Web cloud storage services.<sup>46</sup> Some models of

<sup>38</sup> Frank Stoltze, *LA City Council Approves \$69.6 Million Body Camera Program for LAPD*, S. Cal. Pub. Radio (June 22, 2016), <http://www.scpr.org/news/2016/06/22/61881/la-city-council-approves-69-6-million-body-camera/>.

<sup>39</sup> Newcombe, *supra* note 22, at 34.

<sup>40</sup> COUNCIL ON LAW ENFORCEMENT AND REINVENTION, *supra* note 35, at 3.

<sup>41</sup> See *Body Camera Report*, COUNCIL ON LAW ENFORCEMENT AND REINVENTION 3 (2016), [http://www.michigan.gov/documents/clear/Body\\_Camera\\_Report\\_510729\\_7.pdf](http://www.michigan.gov/documents/clear/Body_Camera_Report_510729_7.pdf) (discussing “prohibitive storage costs of six to eight million dollars per month”).

<sup>42</sup> CBP Body-Worn Camera Working Group, *Body-Worn Camera Feasibility Study Report*, U.S. CUSTOMS AND BORDER PATROL, 17 (Aug. 2015).

<sup>43</sup> Benjamin et al., *supra* note 3, at 25.

<sup>44</sup> Newcombe, *supra* note 22, at 40.

<sup>45</sup> Miller et al., *supra* note 21, at 34.

<sup>46</sup> See Vivian Hung, Steven Babin, Jacqueline Coberly, *A Market Survey on Body Worn Camera Technologies*, NATIONAL INSTITUTE OF JUSTICE, (May 2016) for a comprehensive overview of BWC technology, see, e.g., Vern Sallee, *Outsourcing the Evidence Room: Moving Digital Evidence to the Cloud*, THE POLICE CHIEF (Aug. 2016), <http://www.policechiefmagazine.org/outsourcing-the-evidence-room-moving-digital-evidence-to-the-cloud/> (“The total cost of ownership for in-house servers and accompanying support is more expensive than outsourcing to private cloud providers.”); PoliceOne BrandFocus Staff, *3 Reasons Why You Should be Using the cloud for Body Cam Video Storage*, POLICEONE.COM (May 26, 2015) (“The cloud is cheaper than storing video evidence onsite.”).

BWCs utilize a docking station that both charges the BWC and uploads the BWC video recordings to a cloud-based storage system. In these circumstances, a police officer can upload all BWC recordings captured during a shift, and categorize BWC recordings pursuant to that agency's tagging protocols.<sup>47</sup> Several companies now offer cloud storage that meets the FBI's Criminal Justice Information Services (CJIS) requirements. Compliance with the CJIS Security Policy allows access to CJIS Division systems and information.<sup>48</sup> The purpose of the CJIS Security Policy is to implement appropriate safeguards in the creation, dissemination and storage of Criminal Justice Information.<sup>49</sup>

► *Benefits of a cloud-Based System:* Law enforcement agencies are increasingly recognizing the cost-effectiveness and scalability afforded by cloud-based BWC systems.<sup>50</sup> Some agencies have estimated that utilizing a cloud-based BWC system will generate 30 to 60 percent in cost savings when compared to the equipment, labor, and personnel costs of a local storage system.<sup>51</sup> This is particularly relevant as the cost of cloud storage continues to decrease.<sup>52</sup> Organizations can further limit storage costs by archiving historical BWC recordings in reduced file sizes. A cloud-based or networked data archive system that is accessible via the Internet can archive information in two ways: (i) "warm storage" for information that is needed occasionally; and (ii) "cold storage" for information that is rarely needed.<sup>53</sup> This

type of data archiving can reduce file sizes and the cost of storage.

► *Downsides of a cloud-Based System:* cloud storage used for BWC is primarily owned by a private vendor, rather than by the government. Typically, evidence is stored in government facilities, with law enforcement having full control of access and security. Storing evidence in a private cloud may present security vulnerabilities or thwart law enforcement's ability to retrieve the evidence. In addition to security and confidentiality concerns, dependency on a private third-party cloud service also presents the possibility that costs may increase beyond an office's budget allowances, thus putting law enforcement in a precarious position. Ownership and use of the data should be clearly spelled out in the contract with the private provider, addressing such issues as how to retrieve the data when the contract ends, how the data can be used (if at all) by the vendor, and which non-law enforcement personnel may access the data. The costs of a cloud-based system are significant, including storage costs averaging more than \$325 per year, per cloud terabyte (TB).<sup>54</sup> Although the costs of storing data continue to decrease, at a rate of up to 50 percent every 18 months, law enforcement agencies will continue to expand their use of body-worn cameras, likely increasing video storage demands and related costs.<sup>55</sup>

## Case Study—Volume of BWC Data

### California

■ *San Diego:* In 2015, the County of San Diego had approximately eight TB of recordings submitted to its Office of the District Attorney.<sup>56</sup> It is estimated that the office received more than 11 TB hours of recordings in 2016 and will receive more than 20 TB of recordings per year once BWCs are fully deployed in the County.<sup>57</sup> Since the District Attorney's office only receives the recordings of evidentiary value, the storage demands for the San Diego Police Department, which has possession of all the recordings, is much

higher. As of March 2016, the San Diego Police Department employed 1,874 sworn police officers and was budgeted to hire an additional 162 officers, potentially adding an even greater amount of data.<sup>58</sup>

■ *Chula Vista:* In 2015, the Chula Vista, California, Police Department estimated that its 200 sworn officers could potentially generate 33 TB of data every year.<sup>59</sup>

<sup>47</sup> Hurley, *supra* note 9, at 4.

<sup>48</sup> CRIM. JUSTICE INFO. SERVS. DIV., CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) SECURITY POLICY, at 1 (June 1, 2016), available at <https://www.fbi.gov/services/cjis/cjis-security-policy-resource-center/view>.

<sup>49</sup> *Id.*

<sup>50</sup> A 2015 survey by the Major Cities Chiefs and Major County Sheriffs on the technological needs of BWC, noted that more than 52 percent of agencies surveyed stored their data via cloud service, while 26 percent chose to store their data on a server. The remainder of agencies had not yet determined where they would choose to store their data. See *Technology Needs—Body Worn Cameras*, LAFAYETTE GROUP, 14–15 (Dec. 2015), <http://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

<sup>51</sup> Newcombe, *supra* note 22, at 34. For instance, licenses to TASER International's "evidence.com" management and storage service typically range from \$45 – \$99 per user license per month, depending on the type of access available to the user and the amount of cloud storage supplied. See Merzon, *supra* note 20, at 5.

<sup>52</sup> See generally Amit Kumar Dutta and Ragib Hasan, *How Much Does Storage Really Cost?—Towards a Full Cost Accounting Model for Data Storage*, UNIV. OF ALA. AT BIRMINGHAM, <https://www.bja.gov/bwc/pdfs/dutta-2013-full-cost-accounting-gecon.pdf> (last visited January 18th, 2017).

<sup>53</sup> See, e.g., Benjamin et al., *supra* note 3, at 29.

<sup>54</sup> See Benjamin et al., *supra* note 3, at 30 (assuming officer records four hours of video per shift and works 208 days per year, resulting in 1.19 terabytes of data and a consequential cost of \$336 per year, per officer).

<sup>55</sup> Dutta & Hassan, *supra* note 52, at 1.

<sup>56</sup> Damon Mosler, *Body Worn Camera Video—DA Policy* (May 6, 2016) (unpublished intra-departmental correspondence).

<sup>57</sup> *Id.*

<sup>58</sup> Pauline Repard, *THE SAN DIEGO UNION-TRIBUNE* (Mar. 11, 2016), <http://www.sandiegouniontribune.com/>.

<sup>59</sup> Newcombe, *supra* note 22, at 33.

## Case Study—Volume of BWC Data *continued*

■ **Oakland:** The Oakland, California Police Department captures almost 84 TB of data per year.<sup>60</sup>

### Colorado

■ **Arvada:** A 2016 Arvada, Colorado, study estimated that the average patrol officer recording all citizen contacts during his/her shift would generate more than 1.5 TB of video footage per year.<sup>61</sup> In

2015, the Arvada Police Department employed 228 officers.<sup>62</sup>

### Michigan

■ In 2016, the Michigan State Police estimated that 1,200 personnel working 260 days per year would generate between 1,000 to 2,000 TB of digital information each year.<sup>63</sup>

## RETENTION

The length of time that BWC recordings are stored varies by jurisdiction, and is largely dictated by agency-specific policies, statutes or regulations governing evidence retention.<sup>64</sup> Evidence retention is an area of concern for prosecutors, as for the most part it is the prosecutors, and not police, who determine what evidence is useful to prove a case. However, rather than at the prosecutor's discretion, the primary determinative factor for the retention of BWC video recordings has generally been whether a recording has initially been tagged as "evidentiary" or "non-evidentiary" by the recording officer.<sup>65</sup> The recording officer may not have a full understanding of how a recording can assist in a case and may, therefore, incorrectly tag it as non-evidentiary. It is, therefore, important for prosecutors to work with police departments to define (i) what recordings are considered "evidentiary", (ii) the individual(s) responsible for making this determination, and (iii) how an incorrect designation can be revised when identified.

■ **Non-Evidentiary Retention Time:** BWC recordings that are tagged as "non-evidentiary" are the recorded events that do not correspond to a pending case. Times vary between jurisdictions, but non-evidentiary recordings are typically deleted after 60 or 90 days, thereby saving storage

expenses for recordings that will likely never be needed for evidentiary purposes.<sup>66</sup> Some departments retain recordings for even shorter periods and others may save the recordings for up to a year or two.<sup>67</sup> On occasion, however, the officer might incorrectly tag something as "non-evidentiary" and evidence will be lost.<sup>68</sup> Prosecutors should take steps to understand the protocols under which BWC recordings are initially deemed "evidentiary" or "non-evidentiary" by police departments in their jurisdiction.

■ **BWC Recording With No Tag:** Problems can arise when an officer fails to tag a recording. For instance, the Dallas Police Department automatically deletes untagged footage after 90 days,<sup>69</sup> and Las Vegas after only 45 days.<sup>70</sup> Failure to tag the footage may simply be an oversight by the officer, rather than any true evaluation of the evidentiary value of the recording. This limited period of retention significantly shortens the time for prosecutors to preserve potentially relevant evidence.

■ **Evidentiary Retention Time:** Various factors will determine how long a BWC recording marked as "evidentiary" is retained. While retention periods vary considerably from jurisdiction to jurisdiction, factors may include:

- The crime charged<sup>71</sup>;
- Pre-existing statutes that set retention times for criminal records;

<sup>60</sup> *Id.*

<sup>61</sup> Merzon, *supra* note 20, at 5 n.9.

<sup>62</sup> U.S. Department 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\\_timeLaw\\_enforcement\\_employees\\_colorado\\_by\\_cities\\_2015.xls](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_timeLaw_enforcement_employees_colorado_by_cities_2015.xls).

<sup>63</sup> See COUNCIL ON LAW ENFORCEMENT AND REINVENTION, *supra* note 35, at 3 (estimating "that [the Michigan State Police] would generate 5,000 to 7,000 Terabytes of digital information after three years if all troopers utilized BWC systems and [Michigan State Police] followed its standard document retention policy").

<sup>64</sup> Model Police Policy: Body Worn Cameras, CAL. DIST. ATTORNEYS ASS'N 7 n. 10 (June 2016), available at <https://www.cdaa.org/wp-content/uploads/model-police-policy-for-BWC.pdf>.

<sup>65</sup> Merzon, *supra* note 20, at 8; see also WASH. ASSOC. OF PROSECUTING ATTORNEYS BEST PRACTICES COMM., *supra* note 7, at 13.

<sup>66</sup> Newcombe, *supra* note 22, at 34.

<sup>67</sup> See NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy, NYPD (April 2017) (The NYPD is considering a default one-year retention policy).

<sup>68</sup> Hurley, *supra* note 9, 3.

<sup>69</sup> See Police Body Worn Cameras: A Policy Scorecard, The Leadership Conference, Version 2.03 (Aug. 2016) (citing Dallas Police Department, Bureau of Justice Assistance's Body Worn Camera Toolkit § 3XX.06.B (May 26, 2015)).

<sup>70</sup> Policy Scorecard, *supra* note 69 (citing Las Vegas Metropolitan PD, 5/210.01 Body Worn Cameras (Oct. 2015)).

<sup>71</sup> *Id.*

- ▶ The completion of the defendant's sentence;
- ▶ The finality of appeal and post-conviction motions; and
- ▶ Notification and agreement among all parties to destroy the recording.<sup>72</sup>

## MAINTENANCE AND BACKUP

As with any technology, there must be maintenance and backup. The technology of BWCs is evolving quickly, and police departments will be anxious to obtain the latest version or to replace broken cameras.

### Case Study—Retention time

#### Washington State

■ Recordings in which an incident is identified (i.e., “a unique or unusual action from which litigation or criminal prosecution is expected or likely to result”) must be retained until the matter is resolved or until exhaustion of the appeals process.<sup>73</sup> In Washington State, recordings in which an incident is not identified must be retained for 90 days.<sup>74</sup>

#### New Jersey

■ The state Attorney General directive sets the retention period of any BWC recording at no less than 90 days, subject to the following additional retention periods: (i) when a BWC recording pertains to a criminal investigation or otherwise records information that may be subject to discovery in a prosecution, the recording shall be treated as evidence and shall be kept in accordance with the retention period for evidence in a criminal prosecution; (ii) when a BWC records an arrest that did not result in an ongoing prosecution, or records the use of police force, the recording shall be kept until the expiration of the statute of limitations for filing a civil complaint against the officer and/or agency; and (iii) when a BWC records an incident that is the subject of an internal affairs complaint, the recording shall be kept pending final resolution of the internal affairs investigation and any resulting administrative action.<sup>75</sup>

#### California

■ *Oakland*: The Oakland, California, Police Department retains all video for five years.<sup>76</sup>

■ *Los Angeles*: The Los Angeles County Sheriff's Department policy requires BWC recordings that have been reviewed and deemed to have evidentiary value or otherwise to be preserved by the department for official use shall be assigned a reference number and retained in accordance with applicable laws, department policies, and procedures regarding handling of video and/or evidence.<sup>77</sup> BWC recordings containing incidents not associated with a reference number must be retained for a minimum of 25 months, and may be retained longer at the discretion of the watch commander.<sup>78</sup>

■ **Maintenance of BWC Equipment:** BWC policies should address to whom BWCs are assigned and where BWCs are kept when not in use. Ideally, police departments have enough BWCs to assign one camera to each officer, although budgetary constraints of some departments may limit the number of BWC units maintained by the agency. In some rural or statewide departments, officers may take their police car and equipment, including their BWC, to their homes at the end of their shifts, rather than returning to the department each day. In such circumstances, BWC policies must address how officers will maintain and charge BWCs in their homes, but more importantly, how departments will ensure the BWCs are tamper-resistant and address any chain of custody concerns.

■ **Backing-Up Stored Data:** Backing-up data to a physical or cloud-based server may be conducted automatically or at regularly scheduled times.<sup>79</sup> For instance, data can be backed-up in a docking station or uploaded via a smart-device application.<sup>80</sup> Some systems allow for wireless uploads when the camera is in range of the police station, or in some police cars. cloud-based providers typically enable video files to be uploaded in a secure, encrypted format, reducing the risk of loss.<sup>81</sup> Nevertheless, appropriate safeguards for backup and data recovery should be outlined in clear and documented protocols.<sup>82</sup>

72 Model Police Policy, supra note 64, at 7 n.11.

73 WASH. ASSOC. OF PROSECUTING ATTORNEYS BEST PRACTICES COMM., supra note 7, at 13 (quoting the Secretary of State, Washington State Archives, Law Enforcement Records Retention Schedule, version 6.1 (January 2013)).

74 Id.

75 LAW ENFORCEMENT DIRECTIVE, supra note 33, at 17.

76 Newcombe, supra note 22, at 33.

77 L.A. CTY. SHERIFF'S DEP'T, LASD MANUAL OF POLICIES AND PROCEDURES 447 (undated) available at [https://www.bja.gov/bwc/pdfs/LASD\\_CA-Policy.pdf](https://www.bja.gov/bwc/pdfs/LASD_CA-Policy.pdf).

78 Id.

79 Shanay LaCour, Help! How Do We Store the Massive Data from Body-Worn Cameras?, CENTRE TECHNOLOGIES (Oct. 26, 2015), <https://centretechnologies.com/help-how-do-we-store-the-massive-data-from-body-worn-cameras/>.


80 David K. Bakardjiev, Officer Body-Worn Cameras—Capturing Objective Evidence with Quality Technology and Focused Policies, 56 JURIMETRICS 79, 86 (Fall 2015), available at [http://www.americanbar.org/content/dam/aba/publications/Jurimetrics/fall2015/p79\\_112bakardjievcomment.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/Jurimetrics/fall2015/p79_112bakardjievcomment.authcheckdam.pdf) (internal citations omitted).

81 Kenneth N. Rashbaum and Jason M. Tenenbaum, Police Body Cameras and cloud Storage: Providing the Infrastructure for Success, cloud Hosting Provides Data Management for Police Body Cameras, LOGICWORKS (Jan. 12, 2015), <http://www.logicworks.net/blog/2015/01/police-body-cameras-cloud-storage/>.

82 Id.



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