NOTE

Body Cameras and Criminal Discovery

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As police departments nationwide operate under increasing public scrutiny following numerous high-profile instances of excessive and often lethal force against unarmed African-Americans and Latinos, calls for greater accountability have been nearly unanimous in supporting the use of Body-Worn Cameras (BWCs) by police officers. On September 21, 2015, the Department of Justice announced awards totaling over $23 million to local police departments for the purpose of implementing BWC programs. Announcing the project, Attorney General Loretta Lynch emphasized the hope that BWCs would “enhance transparency, accountability, and credibility” among beleaguered police departments nationwide. But, in addition to recording the activities of the police, BWCs also record the conduct and statements of criminal defendants, victims, and witnesses of crimes. BWC footage has been widely discussed for its potential to hold police accountable for their actions, but it has not yet been subject to scholarly examination for its potential use as evidence in criminal proceedings. This Note fills that gap, focusing on the conflict between the government’s interest in maintaining exclusive control over BWC footage and the defendant’s entitlement to pretrial discovery under Rule 16 of the Federal Rules of Criminal Procedure and the Due Process Clause of the Fifth and Fourteenth Amendments. Although witness safety concerns may justify some limitations on defendants’ access to body-cam footage in exceptional cases, this Note argues that the discovery rules governing analogous pre-existing technologies militate in favor of broad pretrial disclosure of BWC footage.

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INTRODUCTION

The wave of public outrage over the police killings of Michael Brown, Eric Garner, Rekia Boyd, Tamir Rice, Freddy Gray, Walter Scott, Samuel DuBose, and many other unarmed African-American men and women in 2014 and 2015, has given rise to a call for increased police accountability.¹ As this Note undergoes its final edits, the entire country is once again reeling in pain and protest over the most recent round of black fatalities caught on tape after police officers fatally shot Alton Sterling in Baton Rouge, Louisiana and Philando Castile in suburban St. Paul, Minnesota.² The Black Lives Matter movement,


largely formed and fueled in response to mounting African-American deaths at police hands, has drawn global attention to issues of racial justice unseen since the Civil Rights Movement. And calls for reform have reverberated all the way to the White House. Among the policy vehicles for enhancing police accountability, the use of body-worn cameras (BWCs) by police officers has been one of the most widely advocated, garnering the support of nearly 90% of Americans.

BWC technology has exploded onto the law enforcement scene at an unbelievable pace. In November 2014, slain teenager Michael Brown’s family issued a statement urging supporters to “ensure that every police officer working the streets in this country wears a body camera.” The following month, President Obama announced his Administration’s commitment to investing hundreds of millions of dollars in BWC technology as a means of cooling the “simmering distrust” between law enforcement agencies and minority communities. That commitment was solidified on December 18, 2014, when President Obama signed an Executive Order for the creation of “The President’s Task Force on 21st Century Policing” for the purpose of identifying and promoting best practices for police departments. By May 2015, the Task Force had published its final report recommending the implementation of BWC technology at the local level, and the Department of Justice published a toolkit for local authorities seeking to equip their officers with BWCs. The number of state, local, and

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special police forces equipping at least some of their officers with BWCs has grown exponentially, with about a third of the nation’s 18,000 police departments employing the technology as of early 2015. Finally, on September 21, 2015, Attorney General Loretta Lynch “announced that the Justice Department has awarded grants totaling more than $23.2 million to 73 local and tribal agencies in 32 states to expand the use of body-worn cameras and explore their impact.” This swift rise to prominence has led many observers nationwide to predict that the universal use of BWCs by police is inevitable.

But beyond serving as an instrument of police accountability, BWCs are also capable of producing countless terabytes of video evidence for use in criminal prosecutions. Prosecutors have spoken publicly about how inculpatory BWC footage helps them secure convictions and guilty pleas when video evidence leaves little room for defendants to contest charges—most defendants who see themselves caught breaking laws on film do not go to trial. But, where footage is not purely inculpatory, prosecutors have a dual interest in keeping the videos to themselves and blocking defendants’ pretrial access—first, out of concern for [http://perma.cc/LTK3-36WF]; National Body-Worn Camera Toolkit, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST, https://www.bja.gov/bwc/ [http://perma.cc/TZF2-UP99].


the safety of victims and witnesses appearing on the tapes; second, to use BWC footage to their strategic advantage. As BWCs remain an emerging technology, there is little data on the role BWC footage has played in criminal trials thus far. Even less is known about pretrial litigation over access to BWC footage or the role BWC footage plays in the large majority of criminal cases that end in dropped charges or plea bargaining and do not go to trial.

This Note breaks that silence, examining BWCs from the perspective of criminal defendants. I argue that defendants should not be deprived of the opportunity to review BWC footage related to their cases as they work with their attorneys to craft their defenses. Even where footage does not decisively exculpate the defendant, it may provide useful leads for the defendant’s own pretrial investigation and useful context in support of the defense’s theory of the case. For these and other reasons, prosecutors should not have a monopoly on the use of BWC footage as evidence. Judges and policymakers in the position to draw lines around who gets to see what footage when should ensure that body cameras do not simply evolve into yet another form of mass surveillance at the state’s disposal to control and punish marginalized communities.

This Note proceeds in three parts. Part I lays out the legal framework governing criminal discovery at both the federal and state levels and looks at how courts have dealt with analogous technologies. Part II turns to the exceptions to criminal discovery rules and analyzes the degree and kind of BWC

14. A WestLaw search for “body cam,” “body camera,” and “body worn camera” conducted on September 26, 2015, turned up just forty-eight cases in all state and federal jurisdictions. Of those, only thirty-five are classified as criminal cases. By March 23, 2016, the total number of cases found by the same search had risen to ninety-two, sixty-six of which are criminal. Finally, on July 4, 2016, the same search pulled up 132 cases of which 93 are criminal. Not all of these cases actually involve the use of BWCs, and the growing number owes at least in part to the growing cultural significance given to BWCs as a symbol of police accountability and video evidence. Some cases reference BWCs in providing injunctive relief to unconstitutional police practices. See Floyd v. City of New York, 959 F. Supp. 2d 668, 684–86 (S.D.N.Y. 2013) (injunction imposed to address the constitutional harms caused by New York City’s “Stop and Frisk” policy required implementation of a pilot BWC program.). Others refer to body camera programs as indicators of a police department’s technological sophistication. See State v. Witt, 126 A.3d 850, 876 (N.J. 2015) (LaVecchia, J., dissenting) (criticizing majority’s acceptance of State’s argument that obtaining telephonic warrants is impracticable despite State’s ability to implement a more sophisticated body camera program). And still others simply refer in passing to the increasing amount of video footage available for evidentiary use. See State v. McClain, No. 26764, 2016 WL 853674, at *6 (Ohio Ct. App. Mar. 4, 2016) (predicting possible change in due process standard for loss or destruction of evidence “[a]s cruiser cameras, body cameras, surveillance videos, and smart phone videos become more commonplace”).

15. The Electronic Privacy Information Center (EPIC) and the American Civil Liberties Union (ACLU) have raised privacy concerns related to the surveillance function that BWCs serve. See JAY STANLEY, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2–7 (2015), https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all [https://perma.cc/RH8A-9L98]; Jeramie D. Scott, Police Body Cameras: Accountability or Public Surveillance?, PRIVACY RTS. BLOG @ EPIC.ORG (Jan. 29, 2015, 9:30 AM), http://epic.org/blog/2015/01/police-body-cameras-accountability-or-public-surveillance.html [https://perma.cc/RH8A-9L98]. Neither, however, have advocated specifically for defendants’ access rights to BWC footage. This Note does not focus on generalized privacy concerns over surveillance, but on the defendant-specific harms that exclusive state control over BWC footage presents in criminal prosecutions.
footage that may be legally withheld from defendants altogether or released incrementally over the course of the trial. Finally, Part III moves from theory to practice, undertaking a case study in legislation and litigation over access to BWC footage in Washington, D.C. The Metropolitan Police Department (MPD) rotated several BWCs amongst on-duty officers for nearly a year in anticipation of a full-force BWC program that aimed to equip all officers with cameras in 2016. D.C. will be one of the first and largest major cities to transition from a limited pilot program to a fully equipped police force, and will no doubt serve as an example for other major cities looking to do the same. D.C. has emphasized transparency in the use of BWCs by police in the interest of maximizing accountability, going so far as to provide public access to all BWC footage shot in public places. But both the legislative and courtroom battles over access to BWC footage in D.C. suggest that the rules will be different for criminal defendants. This case study highlights the struggle to strike a fair balance between defendants’ rights and witness safety that is likely to recur in courtrooms and state and local legislatures across the country as BWCs become ubiquitous.

I. BACKGROUND

This Part identifies the rules governing criminal discovery in federal and state courts and illustrates how those rules have been interpreted with regard to pre-existing technologies analogous to BWCs. The picture of discovery painted here establishes a solid core of substantive and procedural rights which entitle the defendant to access the government’s evidence against him before trial in order to effectuate his constitutional right to prepare his best defense. Part II will problematize that picture by looking to the exceptions to the discovery rules and analyzing the analogical force of those exceptions when applied to BWC footage.

A. CRIMINAL DISCOVERY: THE LEGAL FRAMEWORK

1. Statutory Discovery: Rule 16 and the Jencks Act

   Criminal discovery is generally regulated by the Federal Rules of Criminal Procedure, and the Jencks Act governs the government’s disclosure obligations

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with regard to pretrial statements of government witnesses. This section begins by analyzing where BWC footage falls under this statutory regime.

Rule 16 of the Federal Rules of Criminal Procedure governs the government’s discovery obligations in federal courts, as well as in state courts that have adopted some iteration of the federal rule. A large portion of BWC footage relevant to criminal trials—that which captures the defendant’s alleged criminal conduct and interactions with police, including arrest and interrogation—is discoverable under the plain meaning of Rule 16’s text. In relevant part, Rule 16(a)(1) reads:

(A) **Defendant’s Oral Statement.** Upon a defendant’s request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) **Defendant’s Written or Recorded Statement.** Upon a defendant’s request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

i. any relevant written or recorded statement by the defendant if:
   - the statement is within the government’s possession, custody, or control; and
   - the attorney for the government knows—or through due diligence could know—that the statement exists;

ii. the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; . . .

It also commands production of “books, papers, documents, data, photographs, [and] tangible objects . . . within the government’s possession, custody, or control” which are “material to preparing the defense,” or which the government intends to introduce as evidence at trial. To the extent that a BWC video captures the defendant speaking, it is a “recorded statement made by the defendant,” falling squarely under Rule 16(a)(1)(B). However, there is likely to

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20. FED. R. CRIM. P. 16(a).

21. For a comparative discussion of state discovery rules, see infra Section I.A.3.


23. Id. (E).
be more on a BWC videotape than just the defendant’s statements, and so long as the rest of the footage may be “material to preparing the defense,” it should be discoverable as a tangible object under Rule 16(a)(1)(E).

In addition to identifying the materials which the defendant is entitled to discover, Rule 16(a)(2) also bars certain materials from discovery. For one, it protects government work product from discovery, shielding “reports, memorandum, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.”24 It also blocks defendants from pretrial access to “statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.”25 Consistent with the police-accountability rationale for introducing BWCs in the first place, BWC footage should not be classified as an “internal government document” exempt from discovery.26 But what about BWC footage containing witness statements? Notably, the defendants’ right to discover materials containing defendants’ pretrial statements trumps the exemptions carved out in Rule 16(a)(2).27 So the government is obligated to disclose footage containing simultaneous statements from both the defendant and prospective government witnesses in advance of trial.

The disclosure of all other prior statements of government witnesses is governed by the federal law cited in Rule 16(a)(2), the Jencks Act.28 The Jencks Act exempts the prior statements of government witnesses from discovery until after the witness is called on direct examination; at that point, all prior witness statements relating to the subject matter of the testimony must be turned over to the defense.29 The stated logic behind delaying disclosure of government witness statements is to protect witnesses from harm and pressure by defendants.30 But for criminal defendants on the other side of the delays, the difference between accessing government witness statements before trial and

24. Id. (a)(2).
25. Id. For discussion of the federal Jencks Act, see supra note 18.
26. Several commentators and organizations have insisted that body camera footage be treated as public record. See, e.g., MEDIA FREEDOM & INFO. ACCESS CLINIC, POLICE BODY CAM FOOTAGE: JUST ANOTHER PUBLIC RECORD 17 (2015) (“Accomplishing [the] accountability goal requires public access to body cam footage.”); Editorial, Police Body Camera Footage Should be Public Record, WASH. POST (Sept. 28, 2015), https://www.washingtonpost.com/opinions/police-body-camera-footage-should-be-public-record/2015/09/28/adaf346e-661c-11e5-9ef3-fde182507eac_story.html [https://perma.cc/BCN8-7P22]. Particular forms of footage may be somewhat analogous to a police work product, but I argue that this set should be extremely narrow. See infra Part II.
27. FED. R. CRIM. P. 16(a)(2) (“Except as Rule 16(a) provides otherwise . . . .”).
29. See id. Many prosecutors will release Jencks materials in advance of trial, sometimes even well in advance of trial. The Act merely provides the baseline for discovery which prosecutors are entitled to meet without exceeding. See generally Ellen S. Podgor, Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference, 15 GEOR. ST. U. L. REV. 651, 678–92 (1999) (describing the results of a survey on Jencks disclosure issued to hundreds of criminal defense attorneys throughout the country).
during trial is hard to overstate. With pretrial access to the government witnesses’ prior statements, a defendant can better assess the government’s case against him, and his defense team can better investigate and prepare for trial.\textsuperscript{31} Information contained in witness statements is especially critical for defendants entering into plea negotiations with the government—and at least 90–95% of criminal charges end in plea deals.\textsuperscript{32}

In sum, the statutory regime governing criminal discovery provides for broad disclosure of defendants’ statements and tangible objects material to the defense. Most BWC footage that a defendant is likely to find useful should be discoverable under Rule 16. The witness-statement discovery bar provides the government with a solid rationale for limiting the disclosure of some BWC footage, which I explore in depth in Part II. But, regardless of whether footage contains witness statements, if it is exculpatory or may be used to impeach a government witness, the defendant’s right to pretrial access is guaranteed under the Due Process Clause of the Constitution, to which I now turn.

2. Constitutional Discovery: \textit{Brady v. Maryland}

The landmark Supreme Court decision in \textit{Brady v. Maryland} announced the defendant’s constitutional right to pretrial discovery of information favorable to his defense.\textsuperscript{33} The \textit{Brady} Court held that “suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”\textsuperscript{34} Accordingly, the Constitution demands that the government disclose both exculpatory evidence that casts doubt on the defendant’s guilt and impeaching evidence that calls into question the credibility of government witnesses.\textsuperscript{35} Importantly for the purposes of BWC footage, “[t]he government’s disclosure obligations encompass information known to police


\textsuperscript{33} 373 U.S. 83 (1963).

\textsuperscript{34} \textit{Id.} at 87.

even if unknown to the prosecutor.”36 Under Brady, then, any piece of BWC footage undermining the defendant’s culpability for the charged offense or the credibility of a government witness must be turned over to the defendant as soon as its exculpatory or impeaching value becomes known to the prosecutor.37

In practice, however, Brady only applies to defendants who go to trial. The Brady rule can be applied in one of two contexts. Pretrial, defendants can raise Brady in moving to compel discovery of exculpatory and impeaching materials in the government’s possession.38 And postconviction, defendants can appeal on the grounds that the government’s failure to produce Brady material prejudiced the outcome of their trials.39 Defendants who enter guilty pleas have no rights under Brady. In United States v. Ruiz, the Court explicitly held that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”40 For defendants seeking access to BWC footage, this means that the most favorable plea offers will be made to defendants with the least amount of knowledge about the government’s case and evidence against them.41 Given the criminal justice system’s powerful tendency to push defendants into pleading guilty,42 policymakers should consider the paucity of constitutional discovery available to defendants entering into plea agreements as they draw up new discovery rules and regulations around BWC footage. As I will now examine, some state legislatures have provided for discovery well beyond the constitutional baseline.

37. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (finding the duty to disclose Brady material is ongoing).
39. See, e.g., United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that a conviction must be overturned on due process grounds where “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).
41. Prosecutors tend to make more favorable plea offers earlier in the plea-bargaining process to persuade defendants to accept, consequently minimizing prosecutorial resource expenditures.
42. Indeed, the Supreme Court has recognized the government’s reliance on guilty pleas to administer the criminal justice system. See Ruiz, 536 U.S. at 632 (a preplea disclosure requirement “could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases. We cannot say that the Constitution’s due process requirement demands so radical a change in the criminal justice process.”). Concerned by the criminal justice system’s mass incarceration of disproportionately poor and minority defendants, and the proliferation of collateral consequences attaching to criminal convictions, many advocates and scholars have called for such a radical change. For a discussion of the negative social consequences of a guilty-plea regime in the prosecution of misdemeanors, see Jenny Roberts, Crashing the Misdemeanor System, 70 WASH. & LEE L. REV. 1089, 1125–28 (2013).
3. State Discovery Rules

The large majority of criminal prosecutions are brought in state courts, each of which may have unique discovery rules. This section surveys the relevant provisions of state discovery rules in order to establish that most states provide for at least as much discovery of defendants’ statements and tangible objects as Federal Rule 16.43

A number of states’ discovery rules are substantially similar in substance, structure, and language to Federal Rule 16. The large majority of state discovery rules provide explicitly for the mandatory disclosure of both defendants’ statements and tangible objects intended for use by the state at trial.44 Seeking to facilitate procedural uniformity with the federal courts, several states have even codified their federal-like discovery rules as Rule 16 of their state criminal procedure codes.45 Some states diverge only slightly from Rule 16’s mandatory discovery baseline. For example, whereas Iowa and Kentucky also mandate disclosure of defendants’ statements, they require a judicial order for the production of tangible objects material to the defense, intended for use at trial by the state, or both.46 Pennsylvania’s rule, despite not requiring production of all defendant statements in the government’s possession, does mandate discovery of transcripts and recordings of all electronic surveillance, rendering it substantially similar to the Federal Rule with regard to BWC footage.47 Finally, Indiana provides for general discovery of all materials intended to be used as evidence by the state.48 This leaves only four jurisdictions with a discovery baseline lower than that established in Federal Rule 16.49

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43. Under the Supremacy Clause, the constitutional rule of Brady applies to all state-court proceedings as well. See U.S. CONST. art. VI, cl. 2.
45. See ALA. R. CRIM. P. 16.1; ALASKA R. CRIM. P. 16; COL. R. CRIM. P. 16; DEL. SUPER. CT. R. CRIM. P. 16; D.C. SUPER. CT. R. CRIM. P. 16; HAW. R. CRIM. P. 16; IDAHO R. CRIM. P. 16; ME. UNIFIED CRIM. P. 16; N.D. R. CRIM. P. 16; OHIO CRIM. R. 16; I. SUPER. CT. R. CRIM. P. 16; S.D. CODED LAWS § 23A-13-1, 3 (2015) (codifying Federal Rule 16 verbatim and titling the statute after the Federal Rule); TENN. R. CRIM. P. 16; UTAH R. CRIM. P. 16; VT. R. CRIM. P. 16; WYO. R. CRIM. P. 16. All of these rules provide for at least the production of defendants’ statements and tangible objects along similar lines to the Federal Rule with the exception of Utah’s Rule 16, which does not provide for the production of tangible objects.
47. See PA. R. CRIM. P. 573.
49. See UTAH R. CRIM. P. 16 (no provision for tangible objects); VA. SUP. CT. R. 7C:5 (same); LA. CODE CRIM. PROC. ANN. art. 716 (only requires production of defendant’s statements made to grand jury and “the substance of any oral statement made by the defendant... which the state intends to offer in
But several states’ discovery rules go further than Federal Rule 16 and the Jencks Act and order the discovery of witness statements before trial. On the broadest end of the spectrum are “open-file” discovery jurisdictions like North Carolina, where prosecutors must give defendants access to “the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”50 Other states even allow criminal defendants to depose the state’s witnesses against them.51 Narrower witness-statement discovery provisions may be explicitly subject to witness safety concerns52 or limited only to the prior statements of witnesses who testify before a grand jury.53 But, in some form or another, at least twenty-one states allow criminal defendants to access the prior statements of the witnesses the state will call against them.54

On paper, then, the rules governing discovery appear straightforward regarding the defendant’s right to access at least that BWC footage in which the defendant appears. Federal Rule 16 and its state-law analogues provide broad access to any recorded statements made by the defendant, and many state rules go above and beyond that baseline. But witness protection is built into all discovery regimes as well—no state law requires the disclosure of materials that may be used by defendants to harm government witnesses. Victim and witness safety is always on prosecutors’ minds as they contemplate the scope of their discovery obligations in a given case,55 and if a defendant is permitted to see video footage of his victims and the potential witnesses against him, his case in chief,” while requiring prosecutors only to notify defense counsel of the existence, but not the content, of other statements made by the defendant). Arizona’s rules of criminal procedure vary by county.


55. Indeed, Deputy Attorney General James M. Cole recently voiced this concern:

In complying with our disclosure responsibilities in criminal cases, prosecutors must ensure that a defendant’s constitutional rights are protected. Yet, we must discharge this important responsibility while simultaneously ensuring that the criminal trial process reaches timely and just results, protects victims and witnesses from retaliation or intimidation, safeguards ongoing criminal investigations, and protects critical national security interests.
perceived opportunity to threaten, intimidate, or harm those witnesses is greater than it would be if he were to see them for the first time in court. The government interest in witness safety thus problematizes the notion of broad discovery and weighs against the defendant’s interest in investigating and preparing his best defense. The next section turns to this balancing of interests as it has taken place in past discovery litigation over analogous technologies.

B. DISCOVERY OF ANALOGOUS TECHNOLOGIES

The conflict over pretrial access to BWC footage is in many ways a higher-stakes rehashing of past battles between prosecutors and defense attorneys over pretrial discovery of analogous technologies. Indeed, concerns over witness safety in the pretrial setting are even older than criminal discovery itself—witness protection trumped defendants’ informational interests through generations of policy debates on the issue before criminal defendants won legal and constitutional entitlements to discovery.56 Since those entitlements were won, the amount and technological sophistication of data used in criminal trials have increased exponentially. As new technologies from wiretaps to dashboard-mounted cameras became incorporated into the criminal justice system, the potential of pretrial discovery both to provide defendants with useful leads to follow in preparing their defense, and to expose witnesses to threats and intimidation, was argued out in court. If body camera use becomes nearly universal, BWC footage will amass more raw data, and will contain a more detailed and accurate record of the police investigation, than any pre-existing surveillance technology. So the determination of who gets to watch what, and when, will be central to shaping the criminal justice system in the age of the body camera. BWC discovery rules will delineate the scope of the government’s informational advantage as its surveillance capacity grows. At the same time, they can potentially equip defendants with a more complete picture of the strength of the government’s case against them even before plea negotiations. But absent legislative policy interventions, judges will be tasked with drawing these lines and will rely on analogies to pre-existing technologies to do so.


56. See, e.g., William J. Brennan, Jr., The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 WASH. U. Q. L. REV. 279, 289–93 (1963). Justice Brennan identified several of the most prominent arguments leveled against pretrial discovery in criminal matters, including witness safety, ultimately supporting discovery as “basically a tool for truth.” Id. at 291. Professor David Louisell addressed the arguments against criminal discovery in depth two years prior to Justice Brennan’s address, tracing them to “the common law’s abhorrence of criminal discovery.” David W. Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 CALIF. L. REV. 56, 57–58 (1961). For an exhaustive list of contemporary reflections on criminal discovery at midcentury, illustrating vividly the ideological foundations of the Warren Court’s “procedural revolution,” see id. at 57 n.2, 59 n.9 (listing sources).
This section looks to analogous existing technologies that have been largely available to criminal defendants as either tangible objects or recordings of defendants’ statements. Like the plain text of Rule 16, these illustrative examples support the broad disclosure of most analogous technologies under that Rule. Part II will then look to the types of evidence most commonly exempted from discovery under the witness-statement bar and identify the arguments analogizing BWC footage with the exceptions to the discovery rules.

Video and audio recordings of crime scenes and police encounters with defendants are normally discoverable under Rule 16 for the reasons discussed above, leaving a thin body of case law dealing with disputes over disclosure. In the few cases where courts have ruled on discovery motions for video footage, whether from stationary surveillance cameras or dashboard-mounted cameras in police cruisers, they have ordered discovery. In United States v. Cerna, a case dealing with privately-made surveillance video footage taken near the scene of a homicide, the court ordered the discovery of surveillance camera footage from a number of surrounding businesses under Rule 16. The defendant in United States v. Stone, an inmate alleged to have murdered another inmate in a federal prison, requested several video recordings made by the government in the institutional setting. The court ordered the discovery of all video footage of his statements under Rule 16. The statements of his cellmate, who was also implicated in the murder, and the surveillance footage of the prison yard and the holding cell where he and his cellmate were taken for questioning, were made available pursuant to Brady. In neither case did the government oppose production of what was standard discovery of government evidence, nor was there any discussion in the rulings as to the presence of witness identities or witness statements on the tapes that might render them discoverable solely as Jencks material, only after the witnesses had testified in court.

Dash-cam footage, perhaps the technology most closely analogous to BWC footage, is quite uncontroversially discoverable by common-sense application...
of the rules. In a prosecution arising from a traffic stop, dash-cam footage will capture the defendant’s allegedly illegal conduct. It may record the police requesting the driver’s consent to search his vehicle, or document the events leading up to an arrest. In all these cases, the footage will contain the defendant’s statements and will fall squarely under Rule 16—it must, therefore, be made available to the defendant upon request. In some cases, dash-cam footage may even exculpate the defendant, necessitating its affirmative disclosure under Brady. So the analogy to dash-cam footage militates in favor of disclosing BWC footage to defendants pretrial.

In the majority of cases in which surveillance or dash-cam footage is a factor, whether it was made by police or taken by police from private sources, courts refer to the footage only for its evidentiary value. The assumption, based on general discovery practices under the rules described above and on practice guides written by defense attorneys, is that such footage was produced without opposition in the course of normal pretrial discovery. So, in order to treat BWC footage differently than dash-cam footage and stationary private surveillance video seized by police investigators, the government must analogize BWC footage to something else.

II. IN SEARCH OF AN EXCEPTIONAL RULE: WITNESS PROTECTION AS GROUNDS FOR NONDISCLOSURE OF BWC FOOTAGE

The legal framework laid out above suggests that BWC footage, in most cases, should be discoverable by criminal defendants. Indeed, anecdotal reports from communities where body camera programs have been introduced suggest as much: A criminal defense lawyer in San Diego told reporters, “It’s pretty clear that we would be entitled to receive the video . . . . Certainly the DA’s
office in this community recognizes that to be the case.”67 Even the U.S. Attorney for the District of Columbia, Ronald Machen, stressed the importance of providing police with adequate resources to administer and organize BWC footage “so that the government can uphold its obligations to provide these materials to criminal defendants.”68 For jurisdictions providing for pretrial discovery of witness statements, full access to BWC footage should be the norm unless and until state legislatures intervene to change the discovery rules as BWC footage becomes ubiquitous.69

But most state rules allow the government to withhold witness statements from defendants, and not all prosecutors have been inclined to concede the discoverability of BWC footage. This Part takes a close look at the most common types of evidence exempted from discovery under the witness-statement bar and analyzes possible analogies between those materials and BWC footage. Although some BWC footage will likely be nondiscussable under this “exceptional rule,” section II.B argues that the witness-statement footage likely to be most useful to defendants must remain discoverable.

A. WITHHOLDING OR DELAYING PREVIOUS STATEMENTS OF WITNESSES

The Brady line of cases has cast into relief what Justice Thurgood Marshall called “two seemingly incompatible notions: the adversary model, and the state’s primary concern with justice, not convictions.”70 And although the government’s stated interest in protecting the privacy and safety of victims and witnesses who appear in BWC footage is legitimate, its conviction-seeking role in the adversarial system provides a separate, unstated rationale for withholding BWC footage.71 Whatever their motivations, prosecutors exercise a great deal of discretion with regard to the scope and timing of discovery. And the breadth

69. Even in jurisdictions ordering discovery of witness statements, rules vary as to the type of offenses covered. In North Carolina, for example, “[p]rosecutors in District Courts . . . have long objected to discovery requests in misdemeanor cases on the grounds that state law provides ‘no right to criminal discovery in District Court.’” J. Bradley Smith, State Highway Patrol Resists Release of Dash-Cam Videos in Criminal Cases, CHARLOTTE CRIM. LAW. BLOG (Apr. 23, 2015), http://www.charlottecriminallawyer-blog.com/2015/04/state-highway-patrol-resists-release-of-dash-cam-videos-in-criminal-cases.html [http://perma.cc/5C5Q-SHVZ].
71. For a modern discussion of the ways in which conviction-seeking may motivate prosecutors to engage in misconduct, especially regarding their discovery obligations, see Hon. Alex Kozinski, Criminal Law 2.0, Preface to 44 GEO. L.J. ANN. REV. CRIM. PROC., at xxvi (2015) (“[A] legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same.”).
of their discretion grows with their ability to rationalize nondisclosure as a function of witness protection. This section examines the different types of witness statements that courts have exempted from pretrial discovery under Rule 16(a)(2) and the Jencks Act and the ways in which BWC footage may be analogous to such materials.

At one end of the spectrum, some forms of BWC footage lacking exculpatory value are likely entirely exempt from discovery. Statements by witnesses are barred from normal pretrial discovery under Rule 16(a)(2), and the Jencks Act requires only that the government disclose the statements and recordings of the witnesses it calls in its case-in-chief. Prior statements of witnesses who do not testify in court are not covered by the Act, and “statements of a government witness made to an agent of the Government which cannot be produced under the terms of [the Jencks Act] . . . cannot be produced at all.” The government is thus entitled to withhold some quantum of BWC footage taken in connection with a case if the defendant does not appear in the footage, and it records police interactions with a nontestifying witness. Indeed, such footage is also analogous to investigative work product, such as officers’ informal interview notes, which is exempted from discovery under Rule 16(a)(2).

This universe of undiscoverable footage is not meaninglessly narrow: the number of individuals with whom police interact in a given case—to develop leads, to acquire character evidence, to build circumstantial evidence—will almost always exceed the number of witnesses the government calls at trial. And a defendant could undoubtedly benefit from video records of police officers’ investigative interviews—to evaluate the credibility of witness claims, to access potential favorable or hostile witnesses that he may call for his defense, or to fill in knowledge gaps in the universe of facts that make up the case against him. Conversely, then, he stands to suffer if his access to that footage is blocked. Prior to the introduction of BWC technology, such a detailed record of the police investigation simply did not exist. So defendants are ill-positioned to seek access to a new type of digital data whose analog analogue would have been off limits. But to the extent that more precise, complete investigation records captured on BWC aid the government in seeking convictions, defendants are made worse off by the existence of nondiscouragable footage under the government’s exclusive control. A dramatic illustration of the potential consequences of the pretrial discovery bar on nontestifying witness statements can be found in Watkins v. United States. In Watkins, the court held that even where a nontestifying witness’s statements were admitted at trial under the “excited utterance” exception to the hearsay rule, his prior statements to the government were not discoverable because he did not physically testify at trial.

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75. 846 A.2d 293 (D.C. 2004).
trial as is required by the Jencks Act.76 So not only could the defendant not confront the witness against him in open court, he could not even prepare to refute the absentee witness’s claims through discovery.

Regarding the prior statements of witnesses who do testify, the Jencks Act compels their disclosure upon the defense’s motion as soon as the witness has testified on direct examination.77 In the context of BWC footage, this may lead to delayed midtrial disclosure of footage in which the defendant does not appear containing the statements of witnesses who end up testifying at trial. The value of such footage—especially considering that if it tended to impeach the testifying witness it would have been subject to mandatory disclosure under Brady—is lower to a defendant in the middle of trial than it would be before trial. Once trial begins, the defendant’s opportunity to investigate his case and craft his defense has all but passed.78 And as for the vast majority of defendants who plead guilty rather than face trial, no law grants them the right to know what the cameras show prior to sealing their fate.79

But classifying a piece of BWC footage in which a witness appears as a “witness statement” is not automatic. In order to decide whether a given piece of BWC footage is exempt from discovery as a witness statement, courts will analogize that footage to other types of evidence that have been exempted from discovery under the rules in the past. The most common nondisclosable witness statements that may be used analogically in order to prevent or delay the disclosure of BWC footage by the government are grand jury testimony, police radio traffic, and 911 calls.

The paradigmatic case of nondisclosable witness statements—and the hardest to analogize to BWC footage—comes in the form of grand jury testimony. Under the Jencks Act, if a grand jury witness testifies in court, his prior sworn testimony will be discoverable after direct examination.80 If a grand jury witness does not testify at trial, however, his statements are completely barred from discovery under Rule 16(a)(2).81 For example, in United States v. Sitzmann, the defendant moved to compel discovery of the grand jury testimony of two witnesses who did not testify at trial.82 Because the defendant did not argue that their grand jury testimony contained the substance of his own statements and the court found that their testimony was not Brady material, his motion was denied.83 The analogy would likewise shield a recorded witness interview with police from discovery, so long as the contents of the interview would not exculpate the defendant or impeach any of the government’s witnesses. But the

76. Id. at 299.
78. See Podgor, supra note 28.
79. See supra notes 39–41 and accompanying text.
80. See supra Section I.A.
83. Id.
formality of a grand jury hearing and its removal from the moment of the alleged crime would likely limit the force of the analogy to cover only BWC footage of formal police interviews with witnesses removed in both time and distance from the scene of the crime. For reasons discussed below, the closer the BWC footage is to the scene of the crime, the harder it will be to shield it from discovery.

In addition to grand jury testimony, courts also favor the government’s ability to withhold tape recordings of police radio traffic (“radio runs”) unless and until the officers on tape testify in open court. In United States v. Carter, the in-court revelation of the radio run recorded just prior to the defendant’s arrest devastated the defense’s theory of the case.84 When the defendant challenged the late disclosure under Rule 16(a)(1)(C)’s requirement to turn over tangible objects material to the preparation of the defense, the court pointed out that the Jencks Act governed the tapes as “statements made by government witnesses” and that Rule 16 did not apply.85 Because BWC regulations typically require police officers to begin recording the moment they initiate a “law enforcement action,” there is unlikely to be a great deal of police–police dialogue captured before the defendant or civilian witnesses enter the scene.86 So the portion of any given piece of BWC footage that is analogous to a radio run is likely to be relatively small.

Finally, like radio runs, courts have “assumed . . . that 911 tapes fall within the [Jencks] Act’s definition of ‘statements,’” as do recorded phone conversations of witnesses.87 In Slye v. United States, the government violated the Jencks Act when it failed to preserve 911 calls that defense counsel requested in July before they were destroyed in October.88 Rule 16 was not implicated because the recordings captured only government witnesses who later testified at trial, and included no statements by the defendant.89 The degree to which BWC footage may be analogous to 911 calls may depend on where the footage is captured. A 911 caller, no matter where he is, enjoys some reasonable expectation of privacy in his communication with the dispatcher.90 A witness’s privacy expectation is likely location-specific, as in Fourth Amendment case law: if a

84. 70 F.3d 146, 147 (D.C. Cir. 1995).
85. Id. at 147 n.1; see also Fadul v. District of Columbia, 106 A.3d 1093, 1096 (D.C. 2015) (“[T]his court has consistently analyzed the failure to preserve a radio run in the context of the Jencks Act.”).
88. 602 A.2d at 137–38.
89. See id.; see also McCraney v. United States, 983 A.2d 1041, 1055 (D.C. 2009) (911 call placed by nontestifying witness is not discoverable under The Jencks Act).
witness is captured on BWC in his home, or in another private setting, he enjoys a reasonable expectation of privacy which may militate against pretrial disclosure of his interactions with police on camera. However, footage of a witness in a public place is more akin to stationary surveillance video, which, as discussed above, is normally discoverable as a tangible object. Still, some witness encounters on BWC video more closely resemble 911 calls, for example when the witness approaches officers to report a crime. Like the 911 caller, those witnesses may have a privacy interest in reporting crime that is not location-dependent. Accordingly, their statements captured on BWC may be excluded from pretrial discovery, falling instead under the Jencks Act.

By reference to discovery rules governing the pretrial discovery of witness statements, courts may limit defendants’ pretrial access to analogous BWC footage. Although this development may appear to be simply an extension of existing law to cover a new technology, it actually signifies an added informational advantage for the government over criminal defendants. Police and prosecutors can utilize the superior accuracy and detail BWC footage of witness interviews represent over handwritten notes or memory to more precisely craft their theory of the case and prepare government witnesses for trial. Defendants, however, remain forbidden from using recorded witness statements to scrutinize the government’s case prior to trial. This one-way flow of the advantages of BWC footage created in the course of police investigations to the government leaves defendants relatively worse off than they would be without such video records. But, as the next section shows, the “exceptional rule” exempting BWC footage has exceptions of its own.

B. DISCOVERING BWC FOOTAGE CONTAINING WITNESS STATEMENTS: TWO EXCEPTIONS

The bar on discovery of previous witness statements does not apply to recordings containing defendants’ statements, nor to exculpatory or impeaching evidence discoverable under Brady. This section briefly examines each of these categories in turn.

1. Statements of Both Witness and Defendant

The first exception to Rule 16(a)(2)’s discovery bar covers any recording “contain[ing] the substance of any relevant written or oral statements made by the defendant.” Unlike materials that are typically withheld from the defense under Rule 16(a)(2), such as grand jury transcripts, radio runs, 911 calls, and government work product related to the evidence in the case, BWC footage—especially footage taken at or near the scene of the defendant’s alleged crime or arrest—likely contains statements made by the defendant in addition to whatever witness statements it captures. As discussed above, courts repeatedly hold that analogous forms of video footage like dash-cam film and surveillance

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videos fall under Rule 16(a)(1)(A) as inclusive of defendants’ statements.\textsuperscript{92} Audio recordings capturing both witnesses and the defendant are discoverable as defendants’ statements as well.

Whereas 911 calls involving only a civilian witness and an emergency dispatcher may be barred from discovery as witness statements, other recorded phone calls that include statements from both witnesses and the defendant have been found to fall under Rule 16. In \textit{Robinson v. United States}, for example, the court found a Jencks violation in the government’s failure to preserve and disclose recordings of jail calls between the defendant and his girlfriend.\textsuperscript{93} But because those recordings contained the defendant’s statements as well as the witness’s, the court found they were “subject to disclosure under both Rule 16 and the Jencks Act.”\textsuperscript{94} Whereas BWC footage containing only the statements of government witnesses—like the 911 calls in \textit{Slye}\textsuperscript{95}—may be shielded from disclosure under Jencks until those witnesses testify, Rule 16 demands timely \textit{pretrial} disclosure of footage in which witness statements coincide with defendant statements, like the jail calls in \textit{Robinson}.\textsuperscript{96}

Thus entitled to pretrial discovery of all BWC footage containing their own statements, the defendant does not necessarily have the right to view crime-scene footage in which the defendant does not appear. Are defendants entitled to discover crime-scene videos filmed before or after videos in which they appear? If witnesses appear in portions of the video from which the defendant is absent, are those portions subject to redaction and withholding under Rule 16(a)(2) and Jencks? None of the analogous issues discussed above provide a definitive answer, leaving the parties few options but to argue it out under \textit{Brady}.\textsuperscript{97}

2. The \textit{Brady} Exception

The other exception to the witness-statement bar invokes the defendant’s constitutional right to access BWC footage as exculpatory material covered by \textit{Brady}. Indeed, “\textit{Brady}/\textit{Giglio} obligations always trump both the Jencks Act and any limiting language in Rule 16,” so defense counsel can argue that the defendant has a constitutional right to any footage that is, or may lead to, exculpatory or impeaching evidence.\textsuperscript{98} “If information is both Jencks material and \textit{Brady} material, it must be disclosed on the earlier \textit{Brady} timeline.”\textsuperscript{99}

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\textsuperscript{92} See supra Section I.B.
\textsuperscript{93} 825 A.2d 318, 329 (D.C. 2003).
\textsuperscript{94} \textit{Id.} at 326.
\textsuperscript{95} See supra notes 86–87 and accompanying text.
\textsuperscript{96} Jencks, and not Rule 16, was the primary focus in \textit{Robinson} because the defendant sought to impose the Jencks remedy of suppressing the testimony of the government witness whose statements were withheld. 825 A.2d at 332.
\textsuperscript{98} United States v. Moore, 867 F. Supp. 2d 150, 152 (D.D.C. 2012); see also Watkins v. United States, 846 A.2d 293, 299 n.7 (D.C. 2004) (“[O]ur hewing to the standard meaning of the Jencks Act by no means leaves the defendant bereft of means for discovering a declarant’s statements to the
If defense counsel argues that BWC footage exemptible under the Jencks Act must be disclosed to aid in the defense’s investigation, pretrial arguments under Brady can be employed to secure that footage. Under Brady, the defense is entitled to any “information of a kind that would suggest to any prosecutor that the defense would want to know about it” because it helps the defense.”99 Information helps the defense if it bolsters the defense’s “opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.”100 Thus the constitutional rule of Brady can be invoked by the defense to compel discovery of relevant BWC footage even if its discovery would otherwise be barred by Rule 16(a)(2) or delayed under the Jencks Act.

Indeed, Brady represents a powerful argument that almost any footage capturing police–police or police–witness interactions before or after police contact with the defendant must be disclosed as a matter of due process. The identities and positions of witnesses captured on film are helpful to the defense team seeking to make contact with as many witnesses as possible in the course of its investigation. The background context of police officers’ demeanor and conduct in approaching the scene may offer valuable insights into their credibility. In short, access to raw footage taken at the scene of an alleged crime will help the defense in nearly all cases.101 It will be “material to either guilt or punishment,”102 as it is likely to provide a strong indication of the legality of the government’s searches, seizures, and arrests, which would affect the suppression or admissibility of government evidence.103 Defense counsel should at least be able to compel an in camera review of the contested footage, by the judge alone, in advance of any suppression hearings so that the court can decide if it qualifies as Brady material or, alternatively, if an articulable threat of harm to a witness should prevent its viewing by the defendant.

government. If a declarant contradicted himself on a key point, then Brady v. Maryland would likely require disclosure.” (quoting United States v. Williams-Davis, 90 F.3d 490, 513 (D.C. Cir. 1993)).


100. Id. at 1257 (quoting Perez v. United States, 968 A.2d 39, 66 (D.C. 2009)).

101. Cf. Essenter v. Cumberland Farms, Inc., No. 1:09–CV–0539, 2011 WL 124505, at *5 (N.D.N.Y. Jan. 14, 2011) (“[I]t is clear that a video showing the time before, during, and after an incident is relevant to determine what actually happened at the moment the injury occurred.”). Of course, footage capturing the defendant in the commission of a crime will not be favorable, but such defendants are unlikely to seek discovery of such footage or even to engage in any discovery at all, given the likelihood that they will plead guilty. See Brown, supra note 31; Sullivan, supra note 12.


103. See Biles v. United States, 101 A.3d 1012, 1020 (D.C. 2014) (“[T]he failure to disclose information material to a pretrial suppression ruling can implicate Brady.”).
III. **“AT THE RAZOR’S EDGE OF BODY WORN CAMERA IMPLEMENTATION”**: A CASE STUDY OF BWC IN D.C.

While several other major cities are in the planning stages of rolling out city-wide BWC programs, Washington, D.C., hopes to equip its entire police force with BWCs in fiscal year 2016. Since October 2014, D.C. has run a pilot BWC program consisting of about 400 rotating devices. Under a great deal of national media and political scrutiny, the D.C. BWC program, passed into law in December 2015, is in many ways a weather balloon for programs in similar jurisdictions nationwide. Because D.C.’s discovery rule mirrors the federal rule and parallels many state rules, D.C. is a prime case study on the legal impact of the advent of BWCs. This Part looks at the development of BWC law in D.C. with respect to criminal discovery from both the policy side and in court.

A. THE LEGISLATIVE BATTLE

D.C.’s body camera policy, finalized in December 2015, plans to equip the Metropolitan Police Department with some 2,400 cameras by summer 2016. Prior to the BWC bill’s passage by the D.C. Council, it was subject to intense public debate involving several different stakeholders. Most organizations that took part in the public roundtable on the program focused on issues related to privacy and public access to the footage. The public access question domi-

104. This language comes from a 2015 statement by D.C. Mayor Muriel Bowser to the Washington Post. See Davis, supra note 17 (“‘Earlier this year, I proposed putting D.C. at the razor’s edge of body worn camera implementation — and despite numerous hurdles that’s exactly what we are poised to do,’ Bowser said. ‘Nationally, we have all seen too many instances where video footage proved to be invaluable. That’s why we are committed to providing every patrol officer with a camera.’”).


108. For example, the Reporters Committee for Freedom of the Press was representative of the public-access argument, emphasizing that “BWC videos are public records that should be treated the same as any other record under the D.C. Freedom of Information Act.” Testimony of Katie Townsend on Behalf of the Reporters Committee for Freedom of the Press on the Metropolitan Police Department’s Body-Worn Camera Program, REPS. COMM. FOR FREEDOM OF THE PRESS (May 7, 2015), http://www.rcfp.org/browse-media-law-resources/briefs-comments/comments-public-access-dc-police-body-camera-video [https://perma.cc/WB5M-86CY]. The ACLU of the Nation’s Capital was one of a number of groups to raise privacy concerns about the surveillance potential of BWCs. See Monica Hopkins-Maxwell, Statement on Behalf of the American Civil Liberties Union of the Nation’s Capital, ACLU OF
nated the discussions of the issue in the media as well, perhaps because of Mayor Muriel Bowser’s controversial proposal to exempt BWC footage from the District’s FOIA process. But much less attention was paid to defendants’ rights to access BWC footage relating to their cases.

Only the Public Defender Service (PDS) advocated for special discovery rules governing BWC footage. In relevant part, PDS argued,

[D]efendants should be given at least the same access to footage of themselves as any other member of the public. A defendant should be able to get directly from MPD any footage that has recorded his/her image. This footage may be redacted to shield the identity of witnesses and bystanders for later disclosure under a discovery rule or statute. But prosecutors should not be able to control our clients’ access to footage that shows their interactions with the police just because those interactions resulted in their being arrested and charged. PDS is also interested in defense access to other footage related to a client’s arrest and alleged crime, such [as] recordings of initial law enforcement contact with a co-defendant, an alleged victim and any witnesses. We are also interested in access to footage potentially related to the defense, such as footage of other incidents captured by or of the particular officers involved in our client’s arrest. . . . PDS strongly believes that current Superior Court Criminal Rule 16 should not be the default for how the defense will have access to MPD body-camera footage . . . .

It remains unclear at this point whether the final regulations will facilitate direct access to BWC footage by criminal defendants. The plain language of the regulations as adopted allows any subject of a BWC recording to view the footage with a legal representative at the police station in which the recording was made:

(a) [T]he Department shall schedule a time for any subject of a BWC recording, the subject’s legal representative, and the subject’s parent or legal guardian if the subject is a minor, to view the BWC recording at the police station in the police district where the incident occurred; provided, that:

(1) Neither the subject, the subject’s legal representative, nor the subject’s parent or legal guardian if the subject is a minor shall make a copy of the BWC recording;

(2) Access to the unredacted BWC recording would not violate the individual privacy rights of any other subject; and


109. See Austermuhle, supra note 104.


111. Id.
Access to the unredacted BWC recording would not jeopardize the safety of any other subject.\textsuperscript{112}

But the requirement that video subjects appear in person at the police station seems to exclude defendants subject to pretrial detention. And carve-outs for witness privacy and witness safety restricting the instances in which unredacted BWC viewing is allowed may leave defendants vulnerable to an adverse determination by MPD, which would seemingly funnel access disputes into the courts.

\section*{B. THE LITIGATION BATTLE}

In D.C., as under Federal Rule 16, the defense is entitled to broad discovery when it comes to tangible objects in the government’s possession. “Documents and tangible objects ‘within the possession, custody or control of the government’ are discoverable if ‘material to the preparation of the defendant’s defense.’”\textsuperscript{113} Video footage may be discoverable either as a tangible object under Rule 16(a)(1)(C) or as a recorded statement by the defendant under Rule 16(a)(1)(A).\textsuperscript{114} As a general rule, “a video—a recordation of a succession of images that may or may not be accompanied by audio—comes within the purview of items that are discoverable under Rule 16.”\textsuperscript{115} The defendant moving to compel discovery must show that the requested discovery is in fact material to the preparation of her defense, but “the threshold of materiality ‘is not a high one; the defendant need only establish a reasonable indication that the requested evidence will either lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence.’”\textsuperscript{116} Indeed, there have been few disputes at the appellate level over the government’s duty to disclose video footage under Rule 16. \textit{Koonce v. District of Columbia}, which announced the above-cited rule on video evidence, involved surveillance footage from a police station showing an operating-while-intoxicating defendant in an allegedly intoxicated state, which the MPD recorded over in the course of business before the U.S. Attorney acted on the defense’s timely discovery request.\textsuperscript{117} The court found that the video was discoverable under Rule 16 in announcing the above rule on video evidence more generally.\textsuperscript{118}

But the published cases from the D.C. Court of Appeals do not tell the whole story of discovery disputes over video footage in general, and BWC footage in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} D.C. MUN. REGS. tit. 24, § 3902.5 (2016).
\item \textsuperscript{113} \textit{Koonce v. District of Columbia}, 111 A.3d 1009, 1013 (D.C. 2015) (quoting D.C. SUPER. CT. R. CRIM. P. 16(a)(1)(C)).
\item \textsuperscript{114} \textit{Id.} at 1015 n.7 (citing both subparts of Rule 16 to support conclusion that video is covered).
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 1013 (quoting Tyler v. United States, 912 A.2d 1150, 1164 (D.C. 2006)).
\item \textsuperscript{117} \textit{Id.} at 1015–17.
\item \textsuperscript{118} \textit{Id.} at 1019–20.
\end{itemize}
\end{footnotesize}
particular. Where BWC footage captures the defendant and the complaining witness in the same sequence culminating in the defendant’s arrest, the government’s discovery obligations militate in favor of disclosure. But where witnesses appear in portions of footage from which the defendant is absent, or where the defendant allegedly poses a risk of harm to one or more witnesses, the government has sought to withhold BWC footage from defendants pretrial. In one such case, the government first sought to withhold discovery materials including some four hours of body camera footage taken at the scene of the offense on the grounds that they were not covered by Rule 16. Instead, the government argued that the entirety of the footage, and the witness statements captured therein, fell squarely under Jencks. When defense counsel moved the court to compel discovery, the government agreed to release the video to defense counsel under the condition that the defendant himself would be barred from viewing it absent a finding of Brady materials within the footage, or a specific need to share certain portions. The government demanded that defense counsel be barred from revealing to the defendant “not only the identity in terms of actual personal identifiable information but also descriptions, . . . attributes, attribution of the statements would not be allowed.” Conditioning discovery in this way may represent the government’s most powerful tool for limiting the defendant’s access to footage.

IV. CONDITIONAL DISCOVERY AND CONSENT PROTECTIVE ORDERS

Rule 16(d)(1) permits the court to issue a protective order limiting or barring discovery of contested material if “sufficient cause” is demonstrated in support of the order. To show sufficient cause, the government must specify a particular harm and narrowly tailor the protective order to avoid that harm.

119. See supra note 26 and accompanying text (defendant’s discovery rights to his own recorded statements trump the government’s privilege to withhold witness statements); see also supra notes 92–95 and accompanying text (discussing a case in which an audio recording of defendant and a witness was discoverable under both Rule 16 and Jencks).


121. Id. at 14.

122. Id. at 13.

123. Id. at 15.

124. See supra note 26 and accompanying text (defendant’s discovery rights to his own recorded statements trump the government’s privilege to withhold witness statements); see also supra notes 92–95 and accompanying text (discussing a case in which an audio recording of defendant and a witness was discoverable under both Rule 16 and Jencks).

125. See, e.g., United States v. Moussaoui, 591 F.3d 263, 289 (4th Cir. 2010) (“[I]n certain contexts there can be an important need to protect a countervailing interest, which may justify a restriction on defendant’s ability to consult with his attorney if the restriction is carefully tailored and limited.”); United States v. Triumph Capital Group, Inc., 487 F.3d 124, 129 (2d Cir. 2007) (same); United States v. Stone, No. 10-20123, 2012 WL 137746, at *7 (E.D. Mich. Jan. 18, 2012) (rejecting request for protective order absent “showing that ‘disclosure will work a clearly defined and serious injury to the party seeking closure. . . . Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing.’” (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994))); Harris v. United States, 594 A.2d 546, 549 (D.C. 1991) (upholding “temporary and limited restriction on defense counsel’s use of what was possibly Jencks material during the period of time it took the court to complete the screening of that material.”).
“Harris v. United States,” the protective order covered a government witness’s taped confession, barring defense counsel from disclosing its contents to the defendant pending the court’s determination whether the tape was discoverable Jencks material.126 Other protective orders have been issued to prevent the disclosure of classified materials to the defendant.127 But the most common justification for imposing a protective order barring the defendant from accessing certain items of discovery is witness protection.128

The government has sought to use witness protection to bypass the cause-showing requirement of Rule 16(d)(1) with respect to BWC footage by presenting defense counsel with “consent protective orders.” In the typical consent protective order, the government withholds otherwise-discoverable materials and demands that the defense agree to certain conditions, such as prohibiting the defendant from viewing the footage, or even prohibiting defense counsel from discussing the footage with the defendant, as a prerequisite for disclosure of those materials. In a consent protective order, the government’s own representations of the witness-protection needs justifying the order are left unchecked by the court. If a defense attorney agrees to such an agreement and it is presented to the court with the consent of both parties, the court is unlikely to deny the order *sua sponte*. This allows the government to contractually restrict the defendant’s access to discovery instead of showing to the court that such a restriction is necessary under the circumstances.

Not only does Rule 16 require the government to request a protective order over contested discovery materials in writing; the Sixth Amendment right to counsel demands that the defendant’s ability to participate in his defense not be unduly restricted. Essential to the defendant’s participation is his access to information. And the information contained in BWC footage taken at the scene of the crime may be critical to effectuate the defendant’s “constitutional right to discuss with his lawyer [matters] such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.”129

As such, courts of appeal have reversed convictions where trial court protective orders prohibited defense counsel from disclosing materials including witness identities that would have been material to the preparation of the defense.130 In *Lancaster v. State*, the trial court issued a protective order barring defense counsel from disclosing the identities and statements of government witnesses on the grounds that the defendant or his associates might otherwise

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126. 594 A.2d at 549.
127.  See Moussaoui, 591 F.3d at 290.
128.  See, e.g., Morgan v. Bennett, 204 F.3d 360, 368 (2d Cir. 2000) (barring disclosure of witness identity); United States v. Herrero, 893 F.2d 1512, 1526–27 (7th Cir. 1990) (same).
129.  Perry v. Leek, 488 U.S. 272, 284 (1989);  see also United States v. Eniola, 893 F.2d 383, 387 (D.C. Cir. 1990) (“’[U]ltimate candor between an attorney and client is essential to effective assistance of counsel.’ Therefore, the sixth amendment protects the defendant against intrusions that could inhibit the free exchange of information between attorney and client.” (quoting Greater Newburyport Clamshell All. v. Pub. Serv. Comm’n of N.H., 838 F.2d 13, 21 (1st Cir. 1990))).
intimidate or retaliate against the witness.\footnote{Id. at 724–25.} Reversing the defendant’s conviction, the Maryland Court of Appeals found that the State had not met its burden of showing sufficient cause that a protective order was required to ensure witness safety. The court cited the government’s failure to present evidence regarding “specific threats . . . against the witnesses”; “Lancaster’s reputation for violence”; or the identity of “any person who might have carried out the alleged threats against the witnesses, as Lancaster and his brother were incarcerated at the time that the alleged threats were made.”\footnote{Id. at 733.} The court then ruled that “the protective order ‘in effect tied [defense] counsel’s hands and foreclosed him from pursuing a valuable source of information’ for cross-examination of the State’s witnesses.”\footnote{Id. (alteration in original) (quoting Clark v. State, 510 A.2d 243, 246 (Md. 1986)).} Thus handicapped, “the protective order placed a marked restraint upon defense counsel’s tactical or strategic judgment, it impaired defense counsel’s effectiveness, violating Lancaster’s right to the assistance of counsel.”\footnote{Id. at 734.}

The \textit{Lancaster} court’s reasoning bears repeating here because that case presents several concerns similar to those around consent protective orders over BWC footage which cite witness protection. First, the government must not only show that specific threats have been made, it must also identify specific individuals with violent tendencies who may carry out those threats. This showing becomes especially important when the defendant is being held in pretrial detention, his communications with the outside world subject to government surveillance. Absent the establishment of a compelling government interest in the protection of government witnesses against specific, realizable threats, the curtailment of the defendant’s Sixth Amendment right to counsel is unjustifiable.

In order to safeguard the defendant’s constitutional right to view and discuss BWC footage relevant to his case, defense counsel facing a proposed consent protective order may file a Motion to Compel Discovery pursuant to Rule 16(d)(2).\footnote{D.C. SUPER. CT. R. CRIM. P. 16(d)(2).} Bringing the matter before the court will force the government to bear its burden of showing sufficient cause to place the footage under a court-issued protective order. However, Rule 16(f) prohibits defendants in detention from filing Rule 16 discovery requests until thirty days after the initial order of detention.\footnote{Id. (f).} In order to compel discovery prior to the Rule 16 timeline, defense counsel can employ the arguments for disclosure under \textit{Brady} outlined in section II.B.2.
CONCLUSION

Advocates, judges, and policymakers should ensure that body cameras fill their purported purpose of increasing police accountability and enhancing police–community relations, because behind that noble goal lies a perverse one. As this Note has discussed, BWC footage has the potential to further tilt the scales of justice against criminal defendants when the investigatory advantages reaped by the government through the collection of video data are unbalanced by a parallel increase in defendants’ pretrial (or preplea) discovery. Criminal discovery means far more to defendants than a procedural formality. Defendants’ pretrial access to BWC footage relevant to their cases may mean the difference between pleading guilty and going to trial; between knowledge and ignorance of witnesses’ stories; between freedom and imprisonment. The imbalance in access to information between the state and the criminal defendant may protect important witness-safety interests in some cases, but ultimately, criminal discovery is “a tool for truth.” Stopping well short of making open government files available to all defendants, sound judicial enforcement of the criminal discovery rules must provide defendants “at least the opportunity to do what the state does when the trail is fresh, namely, seek corroboration of the accused’s story, or lack of it, from external facts through avenues of inquiry opened by what the state has learned.” To curtail that opportunity through discretionary nondisclosure of witness-statement footage, or by limiting the defendant’s access to footage through consent protective orders, is to justify a lopsided system, ultimately undermining the presumption of innocence.

Video materials analogous to BWC footage, such as dash-cam and surveillance footage, have consistently been held to fall under Rule 16(a)(1)(A) as inclusive of defendants’ statements where applicable, and Rule 16(a)(1)(E) as tangible objects in the possession of the government material to the preparation of the defense. Arguments likening BWC footage to nondisclosable materials such as 911 calls or police radio runs may cover some specific segments of BWC footage capturing either only police–witness dialogue or police–police dialogue. Such legitimate court oversight over the competing interests at stake in discovery ought not be seen by either side of the criminal litigation as unwelcome, so long as courts uphold the constitutional requirements of Brady.

Likewise, the government may petition the court to issue a protective order over certain BWC footage, but it must do so through the channels prescribed by Rule 16(d) and not through back-channels, no matter how apparently consensual. As prescribed by Rule 16, the government must show sufficient cause that its proposed protective order narrowly meets a compelling government interest as a matter of constitutional law.

137. Brennan, supra note 55.
138. Id. at 287.
BWCs will soon be ubiquitous in criminal trials in D.C. and in cities across the nation. The lessons from D.C. will prove valuable to both practitioners and policymakers in other major cities looking to ensure that body cameras serve the interests of justice and not gamesmanship. The accountability rationale for the investment in this technology should apply equally to the police and prosecutors to ensure that BWC practices comport with the statutory and constitutional rights of criminal defendants.