

**The Bronx  
Defenders**

**Redefining  
public  
defense**

**New York City Council  
Committee on Public Safety**

**Hearing re: Body Worn Cameras  
November 18, 2019**

**Written Testimony of The Bronx Defenders**

**By Lenora Easter, Team Leader of the Early Defense Team, Criminal Defense Practice**

Chairman Richards and Public Advocate Williams, my name is Lenora Easter and I am an attorney and Team Leader of the Early Defense Team for the Criminal Defense Practice at The Bronx Defenders.

The Bronx Defenders (“BxD”) is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

## **I. Introduction**

BxD expresses our qualified support for Int. No. 1136, which requires the NYPD to track and report important information about the use of body-worn cameras (“BWCs”). While the legislation is an important step towards addressing the lack of transparency of the police

department, there remain important gaps in the overall BWC program that must be addressed in order to fulfill important goals of police accountability and transparency. Below we outline the history of the BWC program and explain how it is failing to live up to its promise and intended purpose. We then discuss problems with the NYPD's BWC policy and provide illustrative examples from cases our office has handled. Finally, we offer some specific recommendations that we believe would make the BWC program more effective. We ask the Council to work in its oversight capacity to:

- Close the vague “exigency” loophole which gives officers too much discretion in choosing when to record civilian encounters;
- Ensure that officers are subject to discipline when they fail to comply with the BWC protocol; and
- Increase the pre-event “buffering period” on all BWCs to two minutes.

## **II. The Unfulfilled Promise of the NYPD's Body Worn Camera Program**

On August 12, 2013, the Federal District Court for the Southern District of New York found that the City's use of stop-and-frisk was unconstitutional in the case of *Floyd v. City of New York*.<sup>1</sup> In a separate Opinion and Order dated the same day, the Court directed the NYPD to “institute a pilot project in which body-worn cameras (BWC) will be worn for a one-year period.”<sup>2</sup> In so doing, the Court identified the potential benefits of outfitting officers with BWCs, noting that the cameras would “provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts. The recordings may either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie”<sup>3</sup>

The NYPD eventually began the BWC pilot in April of 2017. At that time, Mayor DeBlasio billed it as a transparency measure aimed at reducing “mistrust between police and community.”<sup>4</sup> By the end of 2017, approximately 1,300 police officers in 20 precincts across the city were outfitted with BWCs while on evening shifts.<sup>5</sup> In December 2017, the department commenced Phase 2 of the BWC rollout equipping officers on all shifts in every precinct, transit district and Police Service Area citywide. At this time, the Mayor promised the program would make the city “fairer, faster and grow trust between police and communities.”<sup>6</sup> Phase 3 began in March of 2019, with approximately 4,000 BWCs given to specialized units such as the Emergency

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<sup>1</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>2</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013)

<sup>3</sup> Id.

<sup>4</sup> <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>

<sup>5</sup> <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>

<sup>6</sup> <https://www.nydailynews.com/new-york/de-blasio-wear-body-camera-year-article-1.3788661>

Services Unit, Strategic Response Group and Critical Response Command. This Phase was completed in August of 2019.

### **A. The NYPD’s Body Worn Camera Policy**

In the midst of the rollout, in January of 2018, the NYPD formulated a BWC policy which was added to the Patrol Guide. Procedure No. 212-123 (the “NYPD policy”) lays out procedures that apply to “all uniformed members of the service issued a [BWC]” as well as those supervising them.<sup>7</sup> It outlines how to use the camera, when to activate it, and when an officer may view the footage among other things. A section of the NYPD policy entitled “mandatory activation of BWC” *requires* officers to record certain events, including:

- All uses of force
- All arrests and summonses
- All interactions with people suspected of criminal activity
- All searches of persons and property
- Any call to a crime in progress
- Some investigative actions
- Any interaction with emotionally disturbed people

According to the NYPD, these events “must be recorded from start to finish.”<sup>8</sup>

### **B. The Vague “Exigency” Loophole Gives Officers Too Much Discretion**

However, the NYPD policy contains a major loophole which essentially allows officers full discretion over whether or not to actually activate their BWCs in these “mandatory” situations. The loophole states that, “[i]n the event of an unanticipated or exigent occurrence, activate the BWC as soon as it is feasible and safe to do so after taking necessary police action to preserve human health and safety.”<sup>9</sup> While this exception seems reasonable on its face, we have found that officers have exploited it in order to avoid recording stops and searches of individuals “suspected of criminal activity” altogether.

The entire premise of the BWC depends on the cameras being activated properly, and provided to defense counsel, and ultimately, the public. As the ACLU noted presciently, “policies and technology must be designed to ensure that police cannot ‘edit on the fly’—i.e., choose which encounters to record with limitless discretion. If police are free to turn the cameras on and off as

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<sup>7</sup> [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-cameras-patrol-guide.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf)

<sup>8</sup> [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-cameras-patrol-guide.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf)

<sup>9</sup> [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-cameras-patrol-guide.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf)

they please, the cameras' role in providing a check and balance against police power will shrink and they will no longer become a net benefit."<sup>10</sup> Selective recording by police officers threatens to undermine the goal as contemplated by policymakers which led New York City residents to embrace BWC in the interest of police accountability and transparency despite the potential for greater surveillance.

As the New York Daily News recently pointed out, "The great promise of body cameras, the very rationale for their becoming equipment as standard as a baton on cops, is their ability to shine an objective light on police and civilian conduct."<sup>11</sup> As a practicing public defender in the Bronx, I'm here to tell you that this promise remains unfulfilled.

### **III. How the Body Worn Camera Program is Actually Playing Out**

As public defenders, our practice has changed over the last two years as BWCs have become the norm. According to spokespeople from several NYC District Attorney's Offices, "when an arrest is made, the arresting officer sends complete BWC footage of the event to prosecutors almost immediately and in raw, unedited form."<sup>12</sup> This footage is supposed to be provided to defense counsel in the normal course of discovery. While the practice of turning over footage from BWC may differ from one borough to another, in the Bronx, we have seen many instances where footage is not turned over, and when it is, officers failing to capture vital interactions with our clients.

In addition, we have seen that officers have developed codes and hand motions to signal to each other that their BWCs are recording. Often officers will stop talking after receiving this signal, or the officer with the BWC will turn and stop recording in order to have a conversation. This only perpetuates the culture of resistance to transparency that has historically defined the NYPD.

#### **A. Mark's Case<sup>13</sup>**

Occasionally, the BWC footage provided reveals police misconduct. Our client Mark—a government employee who had no criminal record—was arrested on the sidewalk outside of his apartment building and charged with resisting arrest. When he came through arraignments his face was badly injured. Two months later Mark's attorney was provided with BWC footage which showed a crowd of at least 15 officers surrounding him, yelling at him to vacate the

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<sup>10</sup> Jay Stanley, ACLU, *Police Body-Mounted Cameras: With Right Policies In Place, A Win For All Version 2.0* (March 2015) (available at [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf))

<sup>11</sup> <https://www.nydailynews.com/opinion/ny-edit-unrady-for-their-closeup-20191112-qyuglak7ezhfdtnbpll6vzn7y-story.html>

<sup>12</sup> <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>

<sup>13</sup> Pseudonyms used throughout to protect client confidentiality.

sidewalk, and then mobbing him as an officer screamed “taze him.” The footage did not show Mark committing any crime. After a bureau chief at the DA’s office reviewed the footage, the case was dismissed.

This example, while striking, is atypical. Although the outcome was favorable for the client, it is one of a vast majority of instances where officers fail to record their initial interactions with our clients, such as stops and searches. The NYPD policy requires officers to activate their BWC “prior to engaging in” any interaction “with persons suspected of criminal activity.”<sup>14</sup> But as we’ve seen, in many cases officers do not activate the BWC until midway through the encounter, or at the point of arrest. This practice deprives the court and the defense a neutral and objective view of the initial street encounter—the purpose for which the BWC program was instituted by the federal court.

## **B. Nicholas’s Case**

Since the roll out of BWC, attorneys at The Bronx Defenders have seen these problems arise over and over again, especially in cases where the legality of a street encounter between the NYPD and a civilian is at issue. Take the case of our young client Nicholas who was charged with possession of ammunition after police approached him on the street. At the suppression hearing in the case, the officer testified that while sitting in a car with two other officers, he noticed Nicholas walking down the sidewalk. The officer said he didn’t recognize Nicholas from the area and that he was moving in a “suspicious” manner. Based on these observations, the officer made the decision to get out of the car and approach Nicholas to “say hello to him.” This approach initiated a series of events which ended with Nicholas being tackled and arrested.

Though the officer was wearing his BWC the entire time, he *failed to press record* until after Nicholas had been tackled and placed in handcuffs. When asked in court why he didn’t activate the BWC before getting out of the car and approaching our client, the officer responded “I don’t have an answer to that,” and later, “I didn’t have to turn it on until I thought it was okay to turn it on and I didn’t have to turn it on before I exited the vehicle.” Moreover, the officer did not even have the BWC turned on and in “buffering mode” as required by protocol.<sup>15</sup> If it had been, the BWC would have captured the 30 seconds prior to the officer pressing record. The officer had no explanation for why the camera wasn’t in buffering mode.

This officer had been wearing his body camera for a year and a half at the time of the incident. Because of his failure to record the interaction as required by the NYPD protocol, the Court was deprived of the best evidence of what *actually* took place during the street encounter. The stated

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<sup>14</sup> [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-cameras-patrol-guide.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf)

<sup>15</sup> See discussion, *infra*, Part IV.A

purpose of the BWCs—to “provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts”—was thwarted.

### **C. Susan’s Case**

In another case handled by our office, Susan, a 59-year-old woman with no prior contact with the criminal legal system whatsoever, was in her house cleaning her oven when the police and fire department arrived and banged on her front gate. When she told them she was fine and didn’t need assistance they broke the gate, stormed into the apartment, and tackled her. She was arrested and charged with resisting arrest and obstructing governmental administration. In the process she sustained serious injuries to her knees and back which later required surgery. Though both police officers who participated in the arrest were wearing BWCs, the cameras were not turned on until the officers had arrested Susan—after they had forced their way into her home and assaulted her. Once again the BWCs were not recording when they should have been.

These are just two of many instances in which officers have failed to follow their own stated policy, or have relied on a loophole in that policy in order to avoid recording interactions with our clients. In both instances, these officers used discretion in deciding to not record their interactions. This practice allows the NYPD to control the narrative and simply conduct more surveillance on marginalized populations. This is not transparency. Without accountability, the BWC program will serve to further increase the building mistrust between police and communities

### **IV. What Needs to Change**

It is imperative that New York evaluate and adopt policies for the use of BWC that are consistent with the law and public expectation of privacy and accountability. BWCs are not a cure-all to the historical divisions between the department and the communities that it polices. However, we have witnessed firsthand how they can be useful tools to help prevent misconduct and improve community relations, but only when they actually capture the full story. In the courtrooms, we have seen how footage from a body camera helps create a more neutral narrative for our clients who do not have to contend only with the officer’s version of events.

Nevertheless, it’s clear that the current policies put in place by the NYPD prioritizes the interests of law enforcement over that of the public. This has become clear based on our experience seeing the inconsistent use of body cameras by the rank and file officers as well as from the departmental policies issued by the NYPD that fail to address troubling flaws on the use, access, and retention of body camera footage.

The Bronx Defenders applauds the City Council for introducing legislation that demands more transparency and requires the NYPD to report important information about the use of BWC. The public would certainly glean insight into information that has been held solely by the department. However, we believe the City Council can go further in their role in overseeing the BWC program. **The Bronx Defenders respectfully offer the following recommendations to the Council regarding the NYPD BWC program:**

**A. Increase the “Pre-Event Buffering Period” to Two Minutes**

All BWCs are programmed to record a pre-event “buffering period” which captures a certain amount of video prior to an officer pressing record. The purpose of this feature is to both increase accountability for officers, but also to capture events when an officer is not able to immediately press record because for the exigency of the situation. The NYPD has set the buffering period on their cameras for 30 seconds despite the fact that the cameras are capable of recording up to two minutes.<sup>16</sup> This policy must change and the buffering period must be increased.

Other big cities have already moved to longer buffering periods for their BWCs. After an officer-involved shooting in Washington DC that was not captured on BWC despite the fact that the officer was wearing one, DC police moved to increase the pre-event buffering period on their cameras to two minutes.<sup>17</sup> Police departments in both Atlanta<sup>18</sup> and Houston<sup>19</sup> also have their buffering period set for two minutes. New York must do the same. This increase would reduce the likelihood of incomplete footage and problems associated with officers who fail to activate the recordings.

**B. Close the “Exigency” Loophole and Provide Clearer Guidance to Officers and the Public**

The current policy which gives police officers complete discretion in determining when to start recording on the basis of “unanticipated or exigent occurrences” leads to too many critical encounters that will not be recorded or partially recorded. The reality of policing in New York City or any other urban area, and in fact what police officers are trained to do, is to respond to unanticipated situations. Turning on BWC should be as second nature as to calling on the radio to the station house. The current policy de-prioritizes an important piece of police activity using

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<sup>16</sup> <https://help.axon.com/hc/en-us/articles/115000394554-Body-Camera-Settings>

<sup>17</sup> <https://www.wusa9.com/article/news/local/would-proper-use-of-body-cams-help-solve-a-fatal-dc-police-shooting/459182965>

<sup>18</sup> [http://www.atlaudit.org/uploads/3/9/5/8/39584481/apd\\_bwc\\_december\\_2018.pdf](http://www.atlaudit.org/uploads/3/9/5/8/39584481/apd_bwc_december_2018.pdf) at 3

<sup>19</sup> <https://www.bwccorecard.org/static/policies/2017-08-11%20Houston%20BWC%20Policy.pdf> at 5

vague guidelines that can be interpreted to include a vast number of police encounters. This loophole, while presumably present to ensure safety, raises more questions than the problem it seeks to address and must be eliminated. The failure to record should be limited to rare occasions and specific scenarios such as risk to the officer's safety or civilian's safety.

### **C. Impose Meaningful Sanctions on Officers who Fail to Comply with the NYPD Policy**

The current NYPD BWC policy does not include a disciplinary policy for violations of the policies that are in place. Nor does the public know how many, if any, officers have been sanctioned for not following it. The only way to ensure that BWC serves the intended purpose of enhancing police accountability is by specifying clear consequences for failing to record critical encounters, in violation of department policy. The lack of a clear disciplinary action undermines public trust and further suggests that the NYPD's interest lies not in the service of accountability and transparency but in placing the bare-minimum of responsibility on its officers.

The department must make clear to its officers and to the public the measures that are in place to ensure compliance. There should be requirements in the instance where officers fail to record or partially record, they must put their reasoning either in on-camera or in writing immediately after the encounter and before the footage is uploaded. As legal commentators have noted, "If a camera is not activated during an act of deliberate racial profiling, then the camera is serving little deterrence function; it is not going to catalyze a disciplinary response and it will not result in any responsive training."<sup>20</sup>

### **V. Conclusion**

As public defenders we understand that the impact of BWC is not only in recording those incidents that capture the public's attention, but also in the hundreds of stops and arrests conducted by police officers every day. We regularly hear our clients express dismay that their voices will be unheard or disregarded when it comes to their encounters with the police, that an officer's word will hold greater weight than their own. The footage of interactions between the police and civilians caught on BWC provides an opportunity for a more objective narrative to be developed and reduces the reliance on words and memory alone. However, unless strict protocols are formulated and enforced, this promise will remain unfulfilled, and BWCs will become just another tool for surveillance used by the NYPD to further control marginalized communities.

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<sup>20</sup> Murphy, Julian, *Is It Recording? Racial Bias, Police Accountability, and the Body-worn Camera Activation Policies of the Ten Largest U.S. Metropolitan Police Departments in the USA* (April 10, 2019). 9 Columbia Journal of Race & Law 141 (available at <https://ssrn.com/abstract=3369579>).