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The Unblinking Eye Turns to Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law

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THE UNBLINKING EYE TURNS TO APPELLATE LAW: CAMERAS IN TRIAL COURTROOMS AND THEIR EFFECT ON APPELLATE LAW

Mary E. Adkins*

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I. INTRODUCTION

Over the past twenty years, most American courthouses have been wired with audio and video recording equipment to enhance security and economize on court reporting costs. These in-house alterations have an overlooked consequence for appeals. The mere existence of these recordings of all courtroom occurrences will unavoidably change the way appeals are handled and reviewed.

Appellate courts will need to make new types of decisions on whether to accept the audio-video recordings as appellate records or continue the reliance on transcripts and items entered into evidence. If the appellate courts do not accept audio-video recordings as appellate records, or if they accept some but not all recordings, the courts will need to develop a fair and rational way to decide when to use appellate records based on transcripts only and appellate records based on an audio-video recording. Attorneys will also need to consider whether to demand video recordings for trials, and, how to use the existing, probably more limited, forms of recording for appeals.

Recorded court proceedings will also bring pressure to adapt new appellate standards of review. Historically, trial courts have been entitled to the great deference they receive from appellate courts because the trial judge and jury see witnesses, parties, and lawyers and can make value judgments as to credibility, weight of evidence, and like issues. However, the need for that deference may erode with the availability of complete and affordable audio and visual recordings of trial court proceedings.

This Article will discuss the likely implications of complete, gavel-to-gavel audio and video trial court recordings on the appellate record; on standards of review including appellate review of evidentiary rulings and witness credibility; and on distinctions between appeals and collateral actions.
II. AVAILABLE TECHNOLOGY

This section of the Article describes some representative systems found in courtrooms. This Article does not attempt to describe the exact number of video-equipped courtrooms in the United States; any such attempt would be instantly out-of-date, as courtrooms and courthouses are continually built and modernized.

Several basic types of courtroom recording systems exist, each having its own limitations or advantages. For example, a courtroom in the U.S. District Court, Middle District of Florida, has advanced technologies such as Power Point-ready lecterns; microphones with mute buttons at counsel tables; smart monitors at witness stands, which link a touch-screen witness-stand monitor to an image projected to the courtroom at large so that when a witness points to part of an evidentiary document, the judge and jury can easily see what the witness means to indicate. In addition, the counsel tables and the judge’s bench are laptop-ready; the judge typically has a laptop operating during trials, which can be used to follow the images projected by counsel during the trial, or to check documents and law that counsel cite. This modern courtroom is fairly typical of courtrooms which have been built or retrofitted in the past several years. But even this courtroom uses cameras only for security. Although the courtroom walls have niches for mounting cameras, only a few actually contain cameras, and those are used as security cameras. And the cameras are activated with voice-activated microphones, so they would not pick up gestures or other body language of someone who is not speaking.

In Kentucky state courts, by contrast, video recording of court proceedings has not only been in practice since the mid-1980s, but also the recordings produced have been the mandatory appellate record in some parts of the state since 1986. The Kentucky rule governing appellate records mandates that briefs specifically refer to the video record by noting the exact time on the video of the referenced matter. At the time the rule took effect, the predominant medium for video recording was videotape, through which a user must fast-forward or rewind to reach a particular spot. Now that DVD technology predominates, pinpoint time cues can be located quickly.

1. Author’s visit to courtroom in the U.S. Courthouse to view technological features in Jacksonville, Florida (Mar. 6, 2008).
2. Id.
3. Id.
4. In Re: Order Establishing Procedure for Appeals in Which the Videotape a Recordation of Circuit Court Proceedings Serves as the Record on Appeal, Sup. Ct. of Ky. (Oct. 11, 1985) [hereinafter Kentucky Order].
5. Id.
In the Kentucky courtrooms which are outfitted to create a video appellate record, multiple cameras and microphones are placed around the courtroom to record the proceedings; the cameras and microphones are voice-activated.\(^6\)

Most trial courtrooms in Florida have video-recording capability. For example, the Seventh Judicial Circuit has each courtroom outfitted with eight microphones and one camera.\(^7\) The microphones are located at the judge’s bench, the witness stand, one at each counsel table, one each at the lectern, the rail of the jury box, the side of the bench for sidebar conferences, and the clerk’s table, which is generally positioned in front of the judge’s bench.\(^8\) The single camera is located near the ceiling in a corner of the room and provides a panoramic view of the courtroom.\(^9\)

In Alachua County, in Florida’s Eighth Judicial Circuit, some courtrooms, but not all, are similarly outfitted. The courtrooms outfitted to conduct arraignments by remote video from the county jail have four video screens, on which jail inmates are visible; three video cameras, two trained on the two lecterns which face the bench, and one on the bench; another video camera at the rear of the courtroom providing a panoptical view of the courtroom; microphones at the bench, witness stand, each lectern, each counsel table (these with volume control); hanging microphones above the jury box; and a white noise machine at the bench.\(^10\) Interestingly, the video accompanying the audio recording that serves as the official record of the proceedings is the video from the panoptical-view camera, and not that of the cameras trained on the other specific areas of the courtroom.

A view of video recorded on the Florida systems affirms that video recording is not a total panacea curing all disputed issues of what occurred within the four walls of the courtroom. Significantly, optical resolution in Florida systems reviewed is not sufficient to illustrate details of facial expressions or many gestures.\(^11\) Unlike panoptical or voice-activated systems, parts of the courtroom such as the jury box or

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\(^7\) Interview with Dorie Jackson, Manager, Electronic Court Reporting Services, Seventh Judicial Circuit of Florida, in St. Augustine, Fla. (Aug. 6, 2009).

\(^8\) Id.

\(^9\) Id.

\(^10\) Author’s visit to Alachua County Criminal Justice Center to view courtroom technology and digital court reporter monitoring system in Gainesville, Florida (Nov. 19, 2009).

\(^11\) Paula Corbitt, a Digital Court Reporter for the Seventh Judicial Circuit, told of an instance where a sheriff’s deputy asked to see the video of a proceeding in which an audience member had gestured toward a witness by drawing a finger across his throat and firing an imaginary pistol. On review of the video, the gestures were not obvious. Interview with Paula Corbitt, in St. Augustine, Fla. (Aug. 6, 2009).
audience may be obscured or insufficiently detailed due to the single camera. Court participants may also intentionally disguise their actions while on camera. Litigants will need to develop procedures to prevent accidental or intentional frustration of an accurate recording.

III. DO I WANT A VIDEO RECORD OF MY TRIAL? WHEN TO DEMAND AUDIO-VIDEO PRESERVATION. WHEN TO REQUEST REDACTION

Because most states do not use video as the default appellate record of a trial, attorneys should consider the circumstances in which they should request that the video recording of their trial be preserved so the attorney can move that it be used as all or part of the appellate record. Conversely, because video does not automatically redact anything (as a well-trained court reporter might), attorneys should consider the circumstances in which they should request a video recording be redacted.

Recordings of trial proceedings may travel to the appellate court in three ways: as the appellate record itself; as direct evidence in an original proceeding; or as direct evidence in a collateral review of the original proceeding. A minority of states allow video recordings of trials to serve as the appellate record, either in lieu of or accompanying a transcript of the proceedings. In states which do not, a video recording could still be used as direct evidence in original proceedings such as direct-contempt trials, attorney or judicial disciplinary hearings, or post-trial motions.

Most courtrooms have recording equipment operating during most proceedings; however, some of these treat the video component of the recording equipment as a security system only. If the courtroom video is used only as a security camera, a party or attorney deciding to request a video record after the proceeding should be aware of the length of time the court keeps its video recordings before recording over or deleting them.


13. ALASKA R. APP. P. 219; AZ. SUPER. CT. LOC. PRAC. RULES, GILA CNTY, R. 31; AZ. SUPER. CT. LOC. PRAC. RULES, GRAHAM CNTY, R. 1.19; CAL. R. CT. 8.864; GA. UNIF. SUP. CT. R. 9.2(D); KY. REV. STAT. ANN. R. 7, 22ND JUD. DIST.; MD. RULES 8.415; Mo. Rev. Stat. §§ 512.180, 543.335 (2009); N.M. R. CIV. P. DIST. CT., ART. 8, R. 1-074, 1-075; N.D. SUP. CT. ADMIN. R. 52; OR. R. APP. P. 3.63; PA. LOC. CT. R., WESTERN REG., ALLEGHENY CNTY, R. 252; VT. R. APP. P. 10.1, 12.1. Most of these states limit the courts or the circumstances in which they allow video recording to serve as the appellate record. Id.

Prosecution and defense attorneys should consider whether to demand that high-consequence proceedings receive video recording. Some situations which may call for full audio- and video-recording are criminal, particularly felony, proceedings, in which the defendant’s liberty is at stake; capital cases, in which the defendant’s life is at stake; and termination of parental rights proceedings, in which a family’s integrity or a child’s safety is at stake. In fact, in each of these situations, where a transcript is required to satisfy due process, a video record should be required. The additional, nonverbal, information a video record provides is the “best evidence” of what occurred during the proceeding.

When a video recording of testimony would produce a different impression of the testimony than a cold transcript would, courts should develop a professional standard governing when courts should grant use of video in the appellate record. As we shall see later in this article, this standard may be necessary even in court systems that have already provided for use of video as the appellate record.

Conversely, at times the question may be when a party should request a video recording to be redacted to exclude immaterial or confidential testimony. Some situations, such as juvenile proceedings and national security matters, which typically redact names of certain parties to protect confidential or secret information, legitimately may call for a full audio and video recording of a proceeding to be redacted.

In addition, unlike with court reporters, there is no “off the record” with a camera. Everything is recorded. Conventions must be developed to mark what is and is not part of the official record that will be reviewed. “Wired” courtrooms generally have equipment to facilitate confidential communications and discourage breaches, but the equipment, and the use of it, is not infallible.

If, for example, a client, or an attorney, fails to press the mute button on the counsel table microphone before uttering a privileged communication, that communication may still be privileged if the inadvertence is caught and the mute button pressed as soon as the mistake is perceived. A litigant who wishes to preserve the privilege should request that the utterance be redacted from both the audio and

17. See infra text accompanying notes 40-56.
20. See, e.g., United States v. Rigas, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) (finding one of the factors to weigh in determining waiver of privilege is the length of time taken by the party producing the inadvertent disclosure to rectify it).
video records themselves and from any transcript of the audio. On the other hand, a litigant who wishes later to show that counsel ineffectively advised him may elect to preserve the utterance.

Similarly, bench colloquies between counsel and judge can now be kept from the hearing of the jury with the help of a white noise machine. However, although the white noise machine is probably an improvement over the whispered colloquies of past years, it is sometimes placed near a microphone designed to record the words spoken in the bench colloquy. This placement may negate the effect of the white noise, so counsel should be aware of whether to request redaction of words spoken during bench colloquies. In proceedings in which a court reporter is reporting, the court reporter generally makes a notation that the colloquy is occurring at the bench. An audio-visual electronic recording would not have such a notation, but presumably would not need one, as the video would show that the exchange was a bench colloquy.

As a practical matter, counsel or court personnel will have to decide how to redact video recordings—whether to physically edit them to exclude redacted testimony or simply to indicate portions which should be disregarded.

IV. EFFECTS OF THE "WIRED COURTROOM" ON APPELLATE PRACTICE

A. Can the Video Recording be Made Part of the Appellate Record?

Even in courts which video-record all proceedings, and in which the audio recording comprises the official record, the video is usually not part of the appellate record. For example, in Florida the video is considered only an aid to persons transcribing the audio record, such as helping to identify the person speaking. In proceedings without court reporters, often each party has the digital audio recording transcribed for appeal; often, the competing transcriptions do not exactly match. Florida has recently amended a rule of judicial procedure to remedy this issue and ensure that audio recordings are transcribed by approved, trained transcriptionists.

21. See generally id.
22. Supra text accompanying note 12.
23. See supra text accompanying note 15.
24. Telephone interview with Mark Weinberg, Court Administrator, Seventh Judicial Circuit of Florida (July 31, 2009).
25. Interview with Dorie Jackson, supra note 7.
Attorneys practicing in jurisdictions which do not currently provide for video recordings to be used as appellate records may consider moving the appellate court for permission to accept the video recording as the record. If that effort fails, attorneys whose clients can afford a transcript of the appealed proceeding may attach the video recording as an appendix to the appellate record, and have a time and date log accompany the video recording. Then, the attorney may, in the brief, refer the appellate court to specific places in both the transcript and the video recording. This practice may accustom judges to viewing video, and may encourage them to view video when a brief persuades them that the video record is more telling than the cold transcript.

Despite the convenience, added information, and low cost of recordings, transcripts do have advantages. Trained court reporters omit unintentional comments and add some interpretations of non-verbal gestures, such as head shakes or nods. The transcript is a document that is equally unambiguous for all members of an appellate panel. Conversely, the recorded proceeding itself lacks the structure imposed by the court reporter. Different members of a reviewing panel may place emphasis on different offhand grunts, parenthetical comments, and even non-verbal actions within the courtroom itself. It is this very quality, however—the unvarnished record of what happened—that makes the actual recording a powerful means to review the lower proceeding: the unredacted recording pressures traditional standards of appellate review by inviting review of basic fact-finding.

B. Effect of the “Wired Courtroom” on Appellate Standards of Review

1. Overview of Historically Accepted Appellate Standards of Review

Appellate courts give varying amounts of deference to trial court rulings depending, typically, on whether the issue appealed is one of law, of fact, or of a mixed issue of law and fact (sometimes this third category is referred to as “discretion”). The amount of deference an appellate court gives to a trial court is less when the issue appealed is one of law, and greater when the issue appealed is one of fact or Trial Court Performance and Accountability Recommendations, 13 So. 3d 1044, 1045-46 (Fla. 2009).

27. INDIANA JUDICIAL CENTER, supra note 12, at 69 (although “[a] court reporter is not expected to make a record of a gesture,” he or she may under some circumstances “note a very general description of the gesture” for later inclusion in a transcript.).


discretion. The reason typically given for the greater deference for a trial court's findings of fact is that the fact-finder—jury or trial judge—was there and had an opportunity superior to that of the appellate court to observe the evidence. Appellate court review historically has been restricted to the "cold record" or the "bare record," as the word-for-word typed transcript is often called. But video recording can produce a readily reviewable record which provides far more information than a transcript does.

If an attorney does succeed in having video testimony attached as a part or all of the record, should the appellate court give the video recording a different amount of deference than it gives the cold transcript? If the main reason to give the trial court great deference on questions of fact is that only the trial court was able to see and hear the testimony, the availability of video recording of trial proceedings substantially reduces the reason for that deference. Appellate judges can, if they wish, view the video recording and see and hear the testimony itself. The appellate judges also can review things which occur simultaneously in the courtroom and which, therefore, the trial judge may miss. A recording may show that while the trial judge is intently observing witness testimony, the jurors are sleeping, or are fixated on an audience member directing a throat-slitting gesture to the defendant.

2. Effect of Video Record on Review of Evidentiary Rulings and Determinations of Witness Credibility

Historically, most jurisdictions in America have deferred to the findings of fact a trial court makes. The rationale has been that only the finder of fact—the trial judge or the jury—is actually able to perceive


32. See, e.g., Muniz v. State, 851 S.W.2d 238, 261 n.6 (Tex. App. 1993) (Clinton, J., dissenting) (“although . . . there is an aerial photograph in the appellate record, the witness’s allusion is utterly ambiguous on a cold record . . . .”).

33. Some argue that appellate deference to trial courts should be modified anyway as trial judges use heuristic shortcuts not supported by evidence and have other thinking biases that distort their on-the-spot weighing of evidence. Ralph Hertwig, Do Legal Rules Rule Behavior?, in HEURISTICS AND THE LAW 391, 407-08 (Gerd Gigerenzer & Christoph Engel eds., 2006); RICHARD A. POSNER, HOW JUDGES THINK 69-71 (2008).

34. See, e.g., Ciaprazi v. Senkowski, 151 Fed. App’x 62, 64 (2d Cir. 2005).

35. Corbitt, supra note 11.
the witnesses in a trial. The finder of fact has historically been in a better position than the appellate court not only to hear what words a witness says, but also to hear the tone of voice and see the expressions on the witness's face; to see whom or what a witness is looking at during particular parts of testimony; to hear pauses in the testimony and infer their meaning; and to see gestures. Appellate courts defer to findings of fact, then, at least in part, because they cannot see what the factfinder sees.

But now, with video recording of trials, they can. What is more, they can see it repeatedly replayed if they like. The audio recording will add voice inflection and intensity which the written transcript lacks, and the video recording adds body language and non-verbal gestures. For example, a video record would provide a more complete record than a transcript alone in the case of an expert witness who utters the "right" opinion for his witness, but whose body language or tone of voice belie the words uttered, resulting in a fact-finder disregarding that testimony; or in the case of a crime victim testifying that the defendant committed the crime, but sounding far from convinced in her manner of accusing.

When a video recording of testimony would show non-verbal occurrences not appearing on a trial transcript, would illustrate heuristic shortcuts used at trial, or even would give a contrasting impression from that of a transcript, courts should at least allow video recordings to be attached as a part of the appellate record.

Once the video is attached, a court will have to decide whether to afford the video a different amount of deference than it would the transcript.

Some appellate courts are reluctant to allow the availability of video to become an excuse to give less deference to the trial courts. The reasons given have included, among others, judicial economy in the

36. See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, [Federal] Rule [of Civil Procedure] 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

37. See id.


39. Judge Charles J. Kahn, Jr., of Florida's First District Court of Appeal, stated he believed the temptation to substitute his judgment for that of the trial court would be strong; he also expressed his conviction that deference to trial courts is "at the very heart" of America's judicial review system. Interview with Judge Charles J. Kahn, Jr., Judge, District Court of Appeal, First District, Florida, Gainesville, Fl. (Oct. 27, 2009). See also William E. Hewitt, Video Court Reporting: A Primer for Trial and Appellate Judges, 31 Judges' J. 2, 6 (1992).
appellate courts\textsuperscript{40} and the need for finality and stability in judicial review.\textsuperscript{41} Another significant, less-articulated factor may be simple respect for the trial judge's own control over the courtroom without undue interference from the appellate court, especially in matters not amounting to fundamental error.

For example, in \textit{Mitchell v. Archibald}, the Court of Appeals of Tennessee considered a request to view the official video record\textsuperscript{42} of a trial which included both live and audio-taped testimony of the sole witness to a bicycle-truck accident.\textsuperscript{43} The bicyclist was injured and sued the owner of the truck.\textsuperscript{44} The witness had given an audio-recorded statement to the truck driver's attorney shortly after the accident.\textsuperscript{45} Six months later, the witness underwent brain surgery to remove a tumor.\textsuperscript{46} At the trial, the witness admitted that his independent memory of the accident had completely disappeared.\textsuperscript{47} The defense played the tape at trial over the plaintiff's objection and the trial court ruled the plaintiff was barred from recovery.\textsuperscript{48} The plaintiff appealed and, among other things, requested the appellate court to review the taped testimony of the witness.\textsuperscript{49}

The appellate court declined to review the official record of the proceedings, a videotape.\textsuperscript{50} In doing so the court stated several historic reasons appellate courts have deferred to trial courts.\textsuperscript{51} The appellate court began with what Hofer calls the "better position" argument,\textsuperscript{52} stating that the historic reason appellate courts defer is because the trial court "was there" and alone could perceive and evaluate the demeanor of the witness and the other possible influences in the courtroom, such

\textsuperscript{40} See, e.g., Shillington v. K-Mart Corp., 402 S.E.2d 155, 157 (N.C. Ct. App. 1991) (complaining that use of videotapes for appellate review "greatly frustrates effective review," as the time needed to adequately review the evidence is "greatly enlarged"); Travieso v. Golden, 643 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 1994); see also Daniels v. Santic, No. 2004-G-2570, 2005 WL 583798, at *2 (Ohio Ct. App. Mar. 11, 2005) ("this court will not, nor should appellant expect it to, search through the videotapes in order to find passages that support the assignments of error raised.").


\textsuperscript{42} Tennessee is one of the states allowing video recording to serve as the appellate record. Tenn. S. Ct. R. 26 (1993).

\textsuperscript{43} Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998).

\textsuperscript{44} \textit{Id.} at 26, 27.

\textsuperscript{45} \textit{Id.} at 27.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.} at 29.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.} at 29-30.

\textsuperscript{52} Hofer, \textit{supra} note 28, at 238.
as audience members cuing witnesses, as one example.  

However, the *Mitchell* court continued far past the "better position" reason to defer to the trial court, and listed several more: quoting the U.S. Supreme Court, the *Mitchell* court noted first that because the trial judge's main duty is determining fact, that judge will have developed expertise in doing so. Accordingly, an appellate court's duplication of those efforts would not be likely to contribute much to determinations of fact. The *Mitchell* court further noted that parties to an appealed case have already spent a great deal of effort and cost to persuade the trial judge of their account of the facts; it would be "too much" to require them to also persuade an appellate panel. The *Mitchell* court then explained why those additional reasons for deferral to the trial court remain important. Citing the advisory committee note to Federal Rule of Civil Procedure 52(a), the court noted, first, the need to "uphold . . . the legitimacy of the trial courts to litigants"; second, the desire to prevent "an avalanche of appeals"; and third, the need to maintain "the allocation of judicial authority."  

C. Effect of the "Wired Courtroom" on What Constitutes the Appellate Record  

Kentucky was the first state to acknowledge the potential that video recordings of trials held for the appellate process. Its Supreme Court ordered in late 1985 that, in certain jurisdictions, a video recording—at that time a videotape—of a trial would be the only appellate record. Under the order no transcription was allowed except under specific limited circumstances. The Kentucky rule provided that videotaped records must have a date and time stamp and must be accompanied by a log indicating the relevant parts of the trial, indicated by date and time entries on the log. This log was intended to replace references to page and line numbers of typed transcripts.

54. Id. at 29 (quoting Anderson v. City of Bessemer City, 470 U.S 564, 574-75 (1985)).
55. Id.
56. Id. at 29.
57. Id.
58. Id. at 25, 29.
60. An appendix . . . that consists of a transcription of the evidence . . . may be attached to a brief on appeal. . . . The evidentiary appendix . . . shall not exceed fifty (50) pages . . . in the Supreme Court, nor twenty-five (25) pages . . . in the Court of Appeals . . . . An evidentiary appendix shall contain transcriptions of only those parts of the videotape recording that support the specific issues . . . raised in a brief . . . ." *Id.*
61. Id.
62. Id.
At the time of this writing, at least fifteen states have rules regarding using video as all or part of the appellate record. The state statutes or rules typically fall into one of several categories: those which mandate use of video recordings as appellate record under at least some circumstances; those which forbid use of video recordings as an appellate record under at least some circumstances; and those which allow, but do not mandate, it.

D. Other Likely Uses of Recorded Proceedings

Questions regarding attorney and judge behavior during trial are similarly susceptible to video review in the wired courtroom. An attorney may be using inappropriate gestures, intimidating body language toward a witness, or even making hand signals to the witness during a direct or cross examination. A judge may be obviously distracted or drowsy during a proceeding. Particularly in the case of an inattentive judge, attorneys may fail to orally note this on the record out of fear or respect. A camera trained on the bench, on the other hand, would show the appellate court what was obvious to the participants in the trial. Knowledge that a camera is watching may influence judges to pay better attention during trial. And the record the camera makes may demonstrate that even a judge sometimes has an imperfect recollection or impression of courtroom events.

The availability of a permanent video and audio record of a judge’s courtroom behavior could have another effect, one not directly related to whether the judge’s decisions get overturned. That effect is the political effect of a trial judge’s rulings when they come in video format—a format the public can easily consume. When a state judge is subject to re-election rules on a case involving politically sensitive subjects such as handguns, abortions, or sexual orientation issues, she may find the video recording of her ruling on an opponent’s television campaign ad attempting to drum up political opposition. A video camera—the “unblinking eye”—is singularly well-equipped to immortalize the most fleeting misstep.

Similarly, a video record of an attorney’s in-court advocacy could be used for or against that attorney should the attorney decide to campaign for election to the bench.

63. See supra note 13.
V. ADVANTAGES AND DISADVANTAGES OF USING VIDEO RECORDINGS AS APPELLATE RECORDINGS

So, if appellate judges now have the ability to second-guess trial judges on matters of fact, should they? To what degree, if any, should deference to trial courts’ findings of fact be reduced where video recordings are available? Should the mere availability of video recordings be the only criterion when considering whether to employ video as all or part of the appellate record?

A. "Pure" Truth

On the side of what may be called a pure search for truth, one might argue that nothing should hinder a case from having the most accurate record possible seen and heard by a reviewing court. It would seem that in most cases the ability to view a video of a proceeding would allow a judge to hear not only the words, but the way they are stated, the body language of the speaker, and the facial expression of the speaker, and thus, ultimately to ascertain the context and meaning of the speech.

On the other hand, a video of an entire courtroom may provide less information than could an alert court reporter, where a non-speaking person is blocking the camera’s view of the speaking person, or where the video quality is poor enough that one cannot visually identify who is speaking. A disadvantage of the "pure search for truth" is the desirability of judicial finality: the thought that dissatisfied litigants should not be able to use such a complete reproduction of a trial to attempt to have their cases essentially retried by an appellate court.65

B. Cost Considerations

After a courtroom is made video-ready, the cost to a litigant is much less to use a digital video disc (DVD) of proceedings as an appellate record than it is to hire a court reporter, who charges an appearance fee regardless of whether a transcript is ordered, and who charges additional prices to transcribe a proceeding. Against the lower cost of a DVD recording of a proceeding, however, a litigant will need to weigh ease of use: marking a page on a transcript where significant testimony appears may seem easier and more familiar to some people than marking a time cue on a DVD. The lower cost of a DVD record could be seen as a disadvantage, not an advantage: some may fear that low-cost access to an appeal may encourage frivolous appeals.

VI. Effect of the "Wired Courtroom" on Whether an Action Is a Direct Appeal or a Collateral Action Regarding a Judgment

One of the most important impacts of video-recorded proceedings may be on post-conviction relief. Post-conviction proceedings are almost exclusively collateral attacks on a judgment or sentence. They are collateral attacks because they request that the judgment or sentence be overturned based on something occurring outside the formal appellate record, which consists of the printed transcript and physical evidence.66

Many post-conviction proceedings deal with non-verbal, in-court occurrences, such as a sleeping, unprepared, or drunk attorney or juror. Court-recorded videos will provide direct evidence of non-verbal occurrences and their apparent significance to the proceeding. Therefore, recordings of trial court proceedings can relieve the judge from deciding post-conviction claims solely on the basis of witness testimony and the judge’s own recollection of non-verbal occurrences.

Typically, both direct appeals and post-conviction proceedings require the criminal defendant to raise an issue whenever it is first available for review or risk the issue being procedurally barred.67 The difference between the two types of proceedings has been that direct appeals raise for review matters found in a traditional transcript, while post-conviction proceedings, as collateral actions, typically raise for review matters found outside the transcript. The immediate availability of video-recorded evidence as an appellate record will blur the boundary between direct appellate review and post-conviction reviews by making some non-verbal matters available for review on direct appeal. Arguably, recorded trial occurrences should be the subject of immediate post-trial motions and their resolution a matter for direct appeal.68 Forward-looking attorneys should consider whether the

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66. See, e.g., Sneed v. Mayo, 66 So. 2d 865, 873 (Fla. 1953) (granting habeas corpus on a petition making charges which, "if true, are sufficient to . . . require a new trial . . . not because the evidence adduced . . . was insufficient to establish guilt, but because . . . the judgment of conviction is void for failure of the trial court to afford to the defendant the safeguards guaranteed under the Federal Constitution.").


availability of recordings will now require in-court occurrences to be brought on direct appeal instead of in a collateral proceeding.

An example of post-conviction issues where the camera can provide direct proof of the claimed reversible issue is ineffective assistance of counsel claims involving inattentive, sleeping or intoxicated attorneys. The direct proof on the video recording may be sufficient evidence to require the issue to be brought on direct appeal. Courtroom recordings are also probative of sleeping judges or jurors, allowing these claims to be brought on direct appeal. Courtroom audience behavior, such as outbursts of crying or yelling, signs or buttons displayed in the courtroom, retaliatory gestures against a defendant made in front of a jury such as mimed shooting or throat-slitting, can now be seen to have occurred or not on panoptical recordings. Prosecutorial misconduct in closing arguments, which may include non-verbal conduct such as waving arms or other body language, may appear on the recording. Evidence of a defendant's confusion or plain non-comprehension during plea colloquies can be reviewed as it occurs, not as the in-court witnesses recall it occurring. Recordings can also catch juror statements indicating bias if they are inadvertently spoken near enough to a microphone to be recorded. In most jurisdictions, a post-conviction challenge is first reviewed by the court that originally tried the case, and that court makes a threshold determination whether the alleged matter is sufficiently significant or true. With video recording, uncertainty or imperfect memory of nonverbal aspects of the proceedings can be removed from that threshold decision.

Significantly, both direct appeals and post-conviction proceedings can use video recording to scrutinize more closely whether prejudice results from an in-court incident. Direct evidence of prejudicial impact is otherwise lost on a cold transcript. This will be particularly true


70. Ciaprazi v. Senkowski, 151 Fed. App'x 62, 64 (2d Cir. 2005) (evidence of sleeping juror was "thin").


72. Carey v. Musladin, 549 U.S. 70, 76-77 (2006) (lower court found no prejudice from trial spectators wearing buttons with murder victim's picture); Norris v. Risley, 918 F.2d 828, 833-35 (9th Cir. 1990) (overturning a finding of no actual prejudice shown from Women Against Rape buttons in courtroom audience).

73. But see Corbitt, supra note 11.
where alleged prejudice can be studied for juror non-reaction or reaction. A defendant’s claim of prejudice based on a judge’s comments or reading of jury instructions can be assessed for meanings conveyed through the judge’s body language and voice inflections or intensity.

Attorneys general and post-conviction attorneys should consider whether to include recorded proceedings in the post-conviction evidentiary hearings to prove the non-occurrence or occurrence of an alleged constitutional violation. The failure to demand either panoptical recording at trial or the most comprehensive recording actually available in a post-conviction proceeding will likely be criticized because it fails to use material which is available and could shed light on the strength of the post-conviction claim.

A post-conviction filing is now first reviewed for whether the claim can be disposed of through the direct appellate record, and then, only if the claim necessarily involves disputed factual issues, will an evidentiary hearing be held. Evidentiary hearings are the scourge of trial level courts for post-conviction review. They consume large parts of limited court time and logistics for what turns out to be non-meritorious factual claims; in fact, one study has estimated that ninety-nine per cent (99%) of post-conviction claims are denied. With available video of the trial, the process of reviewing post-conviction claims that go beyond the traditional transcribed record can be made much more efficient.

### VII. Countervailing Considerations Regarding Widespread Effect on Appellate Procedure

Courts have given several reasons to not change the standard of appellate review based on the availability of video recording in trial courts. Among these are the need for judicial finality, the difficulty of reviewing a video record, and the desire to retain deference to trial

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74. Puglisi v. United States, 586 F.3d 209, 213 (2d Cir. 2009).

For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Id.

court. However, several additional reasons exist to keep the appellate level of review at its historic levels. A few are discussed below.

A. Overload of Appellate Courts

If mere availability of video recordings of proceedings were to cause a decrease in deference to trial judges, and at a lower cost to litigants, appellate courts would likely find themselves even more inundated with appeals than they already are.\(^77\)

The “pure search for truth” may suggest that appellate courts should always review the video record of a trial where one is available in an appealed case. However, to do so would probably create a huge workload for appellate courts, both in increased time required to review the record and in the possible increase in numbers of appeals. The increased workload would result either in more-overburdened judges, and correspondingly slower decisions, or in an increased number of judges to accommodate this workload, at taxpayer expense. Giving deference to lower courts in most instances acts as a way to expedite access to justice and to preserve judicial finality.

B. Reduction of Interest of Trial Judges or Juries in “Getting It Right” at Trial

A less likely, but still possible, effect of a less-deferential standard of review for video records is the effect it may have on trial judges. There are at least two possible effects. First, a less-deferential standard of review may discourage trial judges from trying to “get it right” at trial, as they would routinely be effectively second-guessed as to both fact and law on appeal. Conversely, however, trial judges may strive even harder to make the right decisions, aware that not only their utterances but also their tone of voice, posture, facial expressions, and indeed their whole demeanor will, like that of a witness, be on display for the appellate court and the public.

C. But, Surprisingly, Fewer Reversals

One effect of having a video record of a trial available to an appellate court is having the appellate court see why a particular judge or jury decided the way it did. For example, in the situations described in the text accompanying footnote 37, involving the tentative expert witness and the victim’s unconvincing accusation, availability of the video record may actually help prevent reversal. If the appellate judge can see the reason the jury discredited the tentative expert witness’s

\(^77\) See FED. R. CIV. P. 52(a) advisory committee’s note.
testimony, for example, the appellate judge may find that the verdict was consistent with the greater weight of the evidence. A 1990 study by the National Center for State Courts of the then-recent implementation in Kentucky of video recordings as appellate records did, in fact, show a lower rate of reversal where appellate judges had the ability to review the proceedings on videotape.\textsuperscript{78}

\textbf{VIII. CONCLUSION}

The availability of video recordings of trials may change how cases are reviewed on appeal, but are unlikely to significantly reduce appellate deference to trial court decisions or destabilize trial court authority or finality. Practical considerations such as court staffing and funding, and fondly held principles such as stare decisis and judicial economy, are likely to remain strong.

\footnotesize{78. JAMES A. MAHER, NAT’L CTR. FOR STATE CTS., DO VIDEO TRANSCRIPTS AFFECT THE SCOPE OF APPELLATE REVIEW? AN EVALUATION IN THE KENTUCKY COURT OF APPEALS 52 (1990).}