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THAWING OUT THE "COLD RECORD": SOME THOUGHTS ON HOW VIDEOTAPED RECORDS MAY AFFECT TRADITIONAL STANDARDS OF DEFERENCE ON DIRECT AND COLLATERAL REVIEW

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The "coldness" of the written record of any trial has long provided the justification (or scapegoat, depending on one's point of view) for the deference appellate courts pay to the rulings of their colleagues on the trial bench.[1] Reviewing judges, as they affirm discretionary decisions by lower courts, routinely recite their inability to second-guess the accuracy of the trial court's conclusion, given that only the trial judge actually

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1. *E.g. Petterson Lighterage & Towing Corp. v. New York C.R. Co.*, 126 F.2d 992, 994-95 (2d Cir. 1942) (L. Hand, J.) (noting that "it is not important how we should have decided the issue on the cold record and without the benefit of the judge's finding" because "decisions [are] legion that when a judge ha[s] seen and heard the witnesses his conclusions [will] prevail unless clearly wrong").

"smell[ed] the smoke of the battle."[2] To hear the appellate courts tell it, they cannot hope to compete with the trial court's careful scrutiny of the demeanor of the witnesses and its attentive monitoring of the complex interplay among jury, witness, court, and counsel.[3]

Perhaps even before the advent of reliable and cheap videotaping technology, those familiar arguments might have been fairly open to skepticism. Now, of course, trial court proceedings can be, and with increasing frequency are, captured on videotape.[4] Video technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decisionmaking. Appellate courts, if they so choose, now can have access via video to the same "data" that presumably inform the discretionary decisions of trial judges, and that were heretofore impossible to examine on appeal. The advent of video technology makes de novo appellate review of such trial court rulings a real possibility for the first time.

The indications thus far, however, are that appellate courts, notwithstanding the availability of videotaped trial records and trial evidence, are extremely reluctant to take advantage of this newly available technology to evaluate, for example, witness credibility, in the course of considering an appeal. In some cases, appellate judges have refused even to watch available videotapes of disputed events, insisting that only the traditional "cold" record permits reasoned decisionmaking. Some judges, indeed, appear to think it dangerous even to consider reviewing the trial "as it happened," as if the prospect of exercising more substantive oversight somehow imperils the legitimacy of the

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2. *Gavin v. State*, 473 S.2d 952, 955 (Miss. 1985) ("[E]ven if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

3. *See Purvis v. Dugger*, 932 F.2d 1413, 1419 (11th Cir. 1991) (emphasizing the "unique position" of the state trial court to determine fact-sensitive issues "after observing [the defendant] and listening to the evidence presented at trial").

4. *See* Georgi-Ann Oshagan, Student Author, *Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?* 38 Wayne L. Rev. 1639, 1639-43 (1992) (discussing videotape transcription projects in Kentucky, Michigan, New Jersey, and North Carolina).

whole enterprise of appellate review.[5]

The appellate courts' reaction to this technological change raises important questions about the traditional standards of appellate deference to trial court decisionmaking. Given the advances in video technology, studying and assessing the demeanor of witnesses, lawyers, and jurors are no longer the exclusive province of the trial court. Yet the appellate standard of deference has never been (solely) the regrettable, but necessary, consequence of technological constraints. Instead, deference represents a deliberate political/institutional choice—a preference for finality and economy, even at the possible expense of accuracy. Nothing demonstrates this point more clearly than the appellate courts' uncomfortable reaction to videotaped records and evidence. Even when the presumed factual barriers to substantive oversight are removed, reviewing courts continue to emphasize the importance of deferring to discretionary decisions rendered below.

In our view, if appellate courts are to continue applying those standards of deference even in the face of technological changes that make them unnecessary, the courts should come clean about the political choices such practices represent. Once we understand the policies behind deferring to trial courts, we can evaluate the institutional concerns at stake without fearing a technology that might actually make the reviewing court's job easier and increase the accuracy of certain determinations on appeal. In contexts where more careful oversight makes sense as a constitutional matter (such as review of death penalty cases, as discussed below), we can use available video technology to exercise that oversight as accurately as possible. Where greater deference makes sense as an institutional matter (as in direct

5. *E.g. Moustakas v. Dashevsky*, 25 Cal. App. 4th 752, 754-55 (Cal. App. 1994) (refusing to consider a videotape of the trial court proceedings as "part of the record on . . . appeal" because "drastic change in the principles of appellate review would be needed before we could base our decisions on appeal on our own evaluation of the sights and sounds of the trial courtroom"); *Shillington v. K-Mart Corp.*, 402 S.E.2d 155, 157 (N.C. App. 1991) (commenting negatively on a state rule permitting appellants to submit only a videotape transcript for the record on appeal and encouraging "appellants to submit, from the outset, a written transcript of the entire proceedings," because "[a]lthough there may be many substantial benefits in videotaping trial proceedings, it is our opinion that the use of videotapes in this Court for appellate review greatly frustrates effective review of the trial proceedings," and the "time needed to adequately review the evidence is greatly enlarged," particularly when "questions of sufficiency of the evidence are determinative").

appeals of routine civil cases), courts can justify the exercise of that deference honestly—by invoking values such as finality and judicial economy, rather than hiding behind no-longer-existent factual limitations.

I. VIDEOTAPE RECORDS ON DIRECT REVIEW

A. Justifying Deference Without Reference to Necessity

Present the same case to two different fact-finders, and each may render a different verdict. The reasons for this observable effect are varied. Many matters that the law defines as questions of fact, such as whether an actor possessed a given mental state, are impossible to establish with mathematical precision. Even less ineffable disputes—whether a traffic light was red or green—may turn entirely on the credibility of witnesses, which is simply another way of saying that they will depend on characteristics of the fact-finder as well as the witness. Even assuming that "we are all realists now,"[6] such arbitrariness is disturbing; confronting it directly and consistently over time would undoubtedly erode one's faith in the judiciary as an arbiter of justice. Fortunately, this problem, while rooted in complex issues of procedure, substance, and psychology, nevertheless has a workable solution, which is to ensure that each case receives the full attention of only one fact-finder.

To the extent that courts accomplish this end, they are said to have achieved finality, a virtue distinct from any consideration of the correctness of the substantive outcome.[7]

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6. William Twining, *Karl Llewellyn and the Realist Movement* 382 (Weidenfeld & Nelson 1973) (commenting on the general acceptance of legal realism with the now-clichéd phrase: "Realism is dead; we are all realists now"). For a recent review of various definitions of "realism," see Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267, 268, 270 (1997) (contrasting what he labels the "Core Claim" of realism with the "Received View" that realism is a "descriptive theory about the nature of judicial decision," which maintains that the "personal tastes and values" of the decisionmaker matter far more than legal rules in determining a particular outcome).

7. *Stutson v. U.S.*, 516 U.S. 193, 197 (1996) (specifically opining that "[j]udicial efficiency and finality are important values").

Particularly where civil cases are concerned, empirical evidence indicates that litigants will accept final outcomes, whether favorable or not, as long as they feel they have had some role in the decisionmaking process.[8] This evidence suggests that appellate courts confronted with videotaped records may act wisely in declining to undertake fact-finding tasks such as evaluating the credibility of witnesses or judging the persuasiveness of an attorney's argument. While videotaped records make these tasks feasible for a judge on direct appeal, they do not necessarily render the use of this capability appropriate in every situation.

Particularly within a vertical (i.e., direct) system of review, decisionmaking should be consecutively limited at each succeeding level not only to minimize costs but also to ensure that each level of review is meaningful in its own right, rather than simply a continuous re-presentation of the same argument, in the hopes that one judge out of several may find it persuasive.[9] In most routine civil cases, these institutional concerns of finality and judicial economy should prevail over any particular litigant's interest in a given outcome. Whether the record below is on paper or video, therefore, the factual findings and evidentiary rulings of most trial courts will continue to deserve and receive appropriate deference.

B. Exercising Deference on Direct Appeal: State Court Experience with Videotape Records

Several states permit videotaped records, and at least one, Kentucky, requires no additional written transcript.[10] Complaints about the videotape procedure generally focus on the quality of the sound on some tapes, as well as the amount of time required

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8. *See generally* John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Assoc., Inc. 1975).

9. *See e.g.* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 55 n. 31 (2000); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 650 (1971).

10. *See* Justice Adele Hedges & Robert Higgason, *Videotaped Statements of Facts on Appeal: Parent of the Thirteenth Juror?* 33 Hous. Law. 24, 24 (July/Aug. 1995) (citing Georgi-Ann Oshagan, Student Author, *Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?* 38 Wayne L. Rev. 1639 (1992)).

to review lengthy trials.[11] With regard to the standard of review, at least one state, Ohio, has expressed (in two unpublished opinions) a willingness to alter, at least slightly, the degree of deference it grants to trial judges when videotaped testimony is involved.[12] Other states, such as Tennessee and Washington, have explicitly rejected attempts to alter the standard of review accorded to a trial court's factual determinations based on the availability of videotaped records.[13] Oddly enough, even these decisions cling to the rhetoric of necessity, noting that video cameras reveal "only a narrow view of the trial court proceedings" and do not "preserve the conduct of [all] participants in the trial," including spectators.[14]

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11. The Sixth Circuit Court of Appeals had this to say about one of Kentucky's videotape records:

> The record is replete with difficulties, not the least of which being its presentation as a videotape. First, the videotape is marginally audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences and whenever two or more participants spoke at once. Second, we are not equipped to produce efficiently the written transcription on which careful review must be founded. Finally, the parties did not have our transcription—indeed, they seemed not to have *any* transcription—rendering oral argument about the events of the trial an exercise in futility. Though we note that Kentucky's experiment in videotaping trials is receiving praise in the press, we wish to call attention to the acute difficulties this innovation presents to courts attempting to fulfill their function of judicial review.

Dorsey v. Parke, 872 F.2d 163, 164-65 (6th Cir. 1989) (citation omitted). "Fortunately," the court went on to note, "we are able to discern enough of the proceedings at [the defendant's] trial to rule on his constitutional claim." *Id.* at 165.

In Alabama, the Court of Civil Appeals complained that it found the videotape record in one case to be "of very poor quality" and cumbersome in that it "require[d] the appellate court to view the videotape for the same length of time as was consumed in the trial itself." *Matthews v. Matthews*, 659 S.2d 621, 622 (Ala. Civ. App. 1994).

12. *See Golias v. Goetz*, 1999 WL 528613 at *4 (Ohio App. July 22, 1999) ("There are occasions when an appellate court need not *overly* defer to the trial judge, for example when witnesses are presented by videotape." (emphasis added)); *Schlundt v. Wank*, 1997 WL 186830 at *5 (Ohio App. Apr. 17, 1997) (reversing the trial court's entry of judgment and reinstating the jury's verdict, based partly on the court's review of videotaped witness testimony). *Id.*

13. *See State v. Polnett*, 1999 WL 1054697 at *4 n. 17 (Wash. App. Nov. 22, 1999) (rejecting the appellant's "suggestion that existence of a videotape alters the standard of review or permits us to give less deference to the court's findings"); *Mitchell v. Archibald*, 971 S.W.2d 25, 29-30 (Tenn. App. 1998) (declining the appellant's "invit[ation] . . . to re-weigh the evidence and to make [an] independent determination of the witness's credibility because the official record of the proceedings is in a videotape rather than a written transcript").

14. *Polnett*, 1999 WL 1054697 at *4 (noting that the court could not detect a "smirk" from the venireman in question by viewing the videotape of the voir dire—which was

Because Kentucky requires no written transcript to accompany a videotape record, its decisions contain the most relevant information regarding how this technology may change the nature of appellate review. One article reports that Kentucky cases decided on the basis of videotape records have no higher reversal rate than those decided on traditional "cold" records, and, in fact, may have a higher rate of affirmances.[15] Comments from appellate judges in Kentucky varied widely on how the videotape procedure has affected their job:

"I do not retry the facts. It's not my job."

"I avoid this problem. I guard against it."[16]

One judge commented that videotape records "reinforce the trial judge's original determination" and "can bolster the outcome."[17]

Perhaps the most interesting thing about the Kentucky cases, though, is the way in which videotaped records have contributed more subtly to the appellate court's analysis. For example, in one case the appellate court provided the following detailed description of the trial court's actions in declaring the evidence closed, in the course of determining that it would not hold the appellant responsible for its failure to move for a directed verdict below:

> At this point in the video-record, the jury returned to the courtroom. After greeting the jurors, the judge informed them that because all housekeeping matters had been disposed of the previous day, he was prepared to commence the reading of jury instructions. Counsel for

admittedly positioned "some distance" from the witness stand—but deferring to the trial judge in any event because he "would have had a better view of such a subtle change in [the venireman's] expression," and this was "precisely the reason for according great deference to the judge's findings"); *Mitchell*, 971 S.W.2d at 29–30 (acknowledging other considerations, but supporting its refusal to alter the standard of review because "videotapes of trial proceedings provide only a narrow view of the trial court proceedings" and do not "record everything going on in the courtroom that the trial court can see," meaning that "while the video recording may capture a witness while he or she is testifying, the recording does not preserve the conduct of other participants in the trial or even spectators in the courtroom that may be the cause of the witness's demeanor, voice inflections, or body language").

15. William E. Hewitt, *Video Court Reporting: A Primer for Trial and Appellate Judges*, 31 Judges' J. 2, 6, 35 (Winter 1992).

16. *Id.* at 35.

17. *Id.*

> [defendant] interrupted the judge to remind him that one remaining piece of evidence had yet to be presented to the jurors. Realizing he had skipped too far ahead, the judge allowed [defendant's] counsel to read some medical record excerpts to the jury.
>
> When [defendant's] counsel finished reading the excerpts to the jury, the judge again hurriedly declared the evidence closed and proceeded to instruct the jury. Thus, it appears the trial judge, in an effort to move the proceedings along quickly, rushed through the formalities which normally follow the close of evidence, and in so doing inadvertently prevented [defendant] from announcing his case was closed and [plaintiff] from formally moving for a directed verdict.
>
> Although the burden of properly preserving the directed verdict issue for appellate review was decidedly [plaintiff/appellant's], and although [plaintiff/appellant] technically did not move for a directed verdict at the close of evidence, because of the unique circumstances surrounding the conclusion of the case at bar, we will proceed to review the Court of Appeals' analysis and resolution of the merits of the directed verdict issue.[18]

Surely these subtleties of the court's procedure, including the "hurried" manner in which the trial judge declared the evidence to be closed, and the apparent lack of opportunity for the appellant to interrupt the jury instructions with a directed verdict motion, would not have appeared on a "cold" record. We can even imagine the court's language in dismissing this claim based on a written transcript—invoking the inability to assess the trial court's demeanor and any non-verbal communication it may have had with counsel, and conclusively presuming, in the absence of additional information, that the appellant had ample opportunity to make its motion. With the benefit of a videotaped record, however, the court was able to make a more reasoned and reliable decision, and determine that, in fact, "unique circumstances" surrounded the conclusion of the case, and that the appellant should not be penalized for having failed to move for a directed verdict below.

In another case, the appellate court affirmed the trial court's determination that a criminal defendant was not unduly

18. *USAA Cas. Ins. Co. v. Kramer*, 987 S.W.2d 779, 781 (Ky. 1999).

prejudiced by the presence in the courtroom of three deputy sheriffs.[19] "Having reviewed the record and viewed the videotape," the court noted that "Appellant was not shackled in any way, and the guards were not located close to Appellant."[20] Additional cases have noted the "body language" of the trial judge in finding no prejudicial judicial misconduct,[21] and asserted, even in reversing a trial court's determination to jail the petitioner pending her testimony, that it was "patently clear from viewing the videotaped record of the proceedings that the circuit judge was acting in good faith with great concern for the petitioner's welfare under suspicious and uncertain conditions."[22] In one case, the appellate court actually commented on a witness's demeanor in reviewing the trial court's determination that the witness was competent to testify, noting that "a review of the videotaped hearing . . . reveals a polite and rather articulate fifteen year old."[23] Despite this obvious access to observational evidence, the appellate court insisted that judging the competency of a witness was a matter committed to the "sound discretion" of the trial court because she "is in the unique position to observe witnesses and to determine their competency."[24]

Overall, this experience does reflect the possibility that appellate courts can make use of the additional information provided by videotape records, but does not bear out the dire predictions cast by the court in *Moustakas*, which warned that even admitting a videotape of the trial proceeding into the record on appeal would require such monumental change in appellate standards of review as to require the involvement of the legislature or some "higher judicial authority."[25] Nor does the availability of videotaped records in Kentucky appear to have inspired disgruntled appellants to seek (much less receive) de novo review of issues such as witness credibility traditionally reserved for the trial judge. Given this experience, appellate

19. *Foley v. Commonwealth*, 953 S.W.2d 924, 938-39 (Ky. 1997).
20. *Id.* at 939.
21. *Transit Auth. of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992).
22. *Campbell v. Schroering*, 763 S.W.2d 145, 147 n. 4 (Ky. App. 1988).
23. *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997).
24. *Id.*
25. *Moustakas v. Dashevsky*, 25 Cal App. 4th 752, 754-55 (Cal. App. 1994).

courts should be able to approach videotaped records with less apprehension, recognizing that appellate deference may no longer be necessary, but certainly remains institutionally desirable in most direct-review cases.

II. REVIEW OF DEATH PENALTY CASES: A CONTEXT WHERE SUBSTANTIVE OVERSIGHT IS JUSTIFIED AND MAY EVEN BE CONSTITUTIONALLY COMPELLED

Since 1976, when the Supreme Court resolved the ambiguity left by its 1972 decision in *Furman v. Georgia*[26] and endorsed capital punishment as a constitutionally acceptable penalty for murder,[27] it has come to be expected that every state-court judgment imposing a sentence of death will be examined through several layers of judicial review. These post-trial proceedings almost always include direct appellate review by the state's highest court, post-conviction review at one or more levels of the state court system, and finally, habeas corpus review in federal court. Although the Supreme Court has observed that the state-court trial must be the "main event" on the road from indictment to execution,[28] the Court's post-*Furman* jurisprudence also emphasizes the important role of meaningful appellate review in guaranteeing that the death penalty will not be administered arbitrarily or capriciously.[29]

Indeed, in capital cases, the search for reliable and accurate results represents a constitutional mandate. Even as it issued its qualified endorsement of the newly-minted post-*Furman* capital sentencing procedures in Georgia, Florida, and Texas, the Court announced in the 1976 cases its recognition that the "qualitative difference" between the penalty of death and all other punishments creates "a corresponding difference in the need for reliability in the determination that death is the appropriate

26. 408 U.S. 238 (1972).

27. *Gregg v. Georgia*, 428 U.S. 153 (1976).

28. *McFarland v. Scott*, 512 U.S. 849, 859 (1994) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined . . . .").

29. *E.g. Parker v. Dugger*, 498 U.S. 308 (1991) (reversing and remanding death sentence where the state supreme court mischaracterized the trial judge's findings regarding the existence of mitigating circumstances).

punishment in a specific case."[30] The Supreme Court has invoked this principle of "heightened reliability" to justify special protections in capital cases, including guaranteeing an African-American defendant accused of an interracial murder the right to question prospective jurors about their attitudes on race, despite maintaining that the trial court may refuse to allow such questioning in a comparable case where the prosecution is not seeking the death penalty.[31]

The same reasoning—that because "death is a different kind of punishment" it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"[32]—supports requiring appellate judges who review capital cases to employ available video technology as an essential means for subjecting such proceedings to meaningful scrutiny. Simply put, where the constitution demands that appellate courts dispose of the cases before them as accurately as possible—as in death penalty cases—it is necessary that the courts use all available information in doing so.

What kind of decisions, with the benefit of video review of trial proceedings, could be made more reliably? Three examples illustrate areas where greater oversight—such as that now possible via video technology—would produce more reliable resolution of critically important federal constitutional issues

30. *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

31. *Turner v. Murray*, 476 U.S. 28 (1986); *cf. Ristaino v. Ross*, 424 U.S. 589 (1976) (such inquiry not routinely required in non-capital case). It should be acknowledged that the Court has, on a couple of occasions, hesitated to extend the "heightened reliability" principle to the post-conviction or habeas corpus stage. *E.g. Herrera v. Collins*, 506 U.S. 390, 390 (1993) (finding no constitutional right for death-sentenced prisoner to raise freestanding claim of "actual innocence" in federal habeas proceeding); *Murray v. Giarratano*, 492 U.S. 1 (1989) (finding no constitutional right to state-appointed counsel for indigent death-sentenced prisoners seeking state post-conviction relief). However, the Court has recognized that direct appeals of right generally have become such an accepted part of the criminal justice system that they trigger the demands of due process. *See e.g. Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Douglas v. California*, 372 U.S. 353, 355-57 (1963). In a death penalty case, it would seem appropriate to apply the "heightened reliability" principle to direct review proceedings, even if not to habeas corpus proceedings. *Cf. Gardner v. Florida*, 430 U.S. 349, 361 (1977) (noting, as one reason for requiring that certain information be included in the trial record, that such a rule will ensure that the appellate review of the trial court's judgment will advance the constitutional goal of reducing arbitrariness in the imposition of the death penalty).

32. *Gardner*, 430 U.S. at 357–58.

where a defendant's life is at stake: issues arising in jury selection, errors in closing argument, and claims of ineffective assistance of counsel.

A. Juror Selection Issues

The Sixth Amendment right to an unbiased jury limits the State's power to challenge for cause prospective capital jurors who harbor reservations about the death penalty.[33] From 1968 to about 1985, the broad enforcement of this constitutional principle resulted in the reversal of numerous death sentences, both in state courts and on federal habeas review.[34] However, over time, reviewing courts (especially federal courts sitting in habeas corpus) came to apply conventional notions of deference to trial court findings in this context, with the predictable consequence that fewer and fewer death sentences were vacated on this ground. This movement culminated in the Supreme Court's 1985 decision in *Wainwright v. Witt*,[35] which effectively immunized such claims from reexamination on federal habeas corpus by defining the trial court's decision about a particular juror's qualifications as a finding of fact.[36] The *Witt* Court

33. *Witherspoon v. Illinois*, 391 U.S. 510, 530 (1968). The same principle applies with equal force to a juror who generally favors the death penalty (i.e., he is legally qualified so long as his pro-death-penalty views do not "substantially impair" his performance of his legal duties as a juror). *See Morgan v. Illinois*, 504 U.S. 719, 728–29 (1992).

34. This was probably a consequence of the *Witherspoon* Court's suggestion that the State could exclude only those individuals who "made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment." *Witherspoon*, 391 U.S. at 523 n. 21. According to the Court's reasoning in *Witherspoon*, the appropriate remedy for such a violation was a new sentencing proceeding before a constitutionally assembled jury; the integrity of the defendant's conviction was not affected. *Id.*

35. 469 U.S. 412 (1985).

36. Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state court decisions resolving questions of law and mixed questions of law and fact were subject to de novo review in habeas proceedings. *See e.g. Dison v. Whitley*, 20 F.3d 185, 186 (5th Cir. 1994) (federal habeas court reviews issues of law de novo); *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993) (mixed questions of law and fact are reviewed de novo). In contrast, state court findings of fact, entered in writing after a fair hearing with certain procedural guarantees, were generally presumed correct. *See* 28 U.S.C. § 2254(d) (1994) (former law). Under AEDPA, state court determinations of fact carry a strong presumption of correctness that can only be overcome by "clear and convincing" proof, and the statute specifies no conditions precedent for the presumption of correctness. 28 U.S.C. § 2254(e)(1) (Supp. 1998). With respect to all other state court determinations, a federal habeas court may only grant relief if it concludes that the state

emphasized that deciding whether a prospective juror's views about the death penalty would render her unable to sit fairly in judgment required sensitive attention to the juror's manner and demeanor during her voir dire examination.[37]

In the wake of *Witt*, post-trial review of claims that a prospective juror was wrongly excluded on account of his views about the death penalty has become virtually a dead letter. However, appellate and post-conviction review of the videotaped record of voir dire could reanimate this moribund constitutional guarantee by ensuring that trial judges allow prospective jurors reasonable latitude in their views regarding the death penalty, and only disqualify those who are genuinely "substantially impaired." By empowering appellate and habeas courts to exercise substantive oversight over the "death qualification" process, reliance on videotaped voir dire records could restore some much-needed balance to this part of the capital trial.

As any honest and experienced capital litigator will acknowledge, the *Witherspoon/Witt* regime, in practice, has tended to result in the exclusion of more anti-death-penalty jurors than their pro-death-penalty counterparts.[38] This disproportionate exclusion probably results from the fact that opposition to the death penalty is often grounded in moral or religious values, whereas enthusiasm for the death penalty is

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court's decision was "contrary to, or involved an unreasonable application of Federal law," or was based on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d) (Supp. 1998); *see generally (Terry) Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495, 1518-23 (2000) (opinion of O'Connor, J., for the Court) (explaining how, under AEDPA, "reasonableness" review supersedes former de novo review).

37. *Witt*, 469 U.S. at 428.

38. Exclusions on this basis also implicate issues of racial discrimination because people in minority communities are more likely than those in Anglo communities to express reservations about the wisdom or morality of capital punishment. *E.g.* Kirk Loggins, *Poll Finds Race and Gender Affect Death Penalty Views*, The Tennessean 1A (Nov. 1, 1999) (poll indicating that 70% of whites favored the death penalty, versus only 39% of blacks); Allan Turner, *Some in Jasper Urge 'Eye for an Eye,'* Hous. Chron. 1 (Feb, 25, 1999) (noting that "[a] Scripps-Howard Texas Poll earlier this year showed that only 46[%] of blacks [in Texas] endorse the death penalty, compared with 81[%] of whites"); Scripps Howard News Serv., *Many Blacks in Poll Back School Prayer*, Dallas Morning News 8A (Apr. 18, 1996) (observing that "[B]lacks are much less willing to support the death penalty [than other 'tough on crime' measures]. Less than half of those surveyed—48 percent—said they backed capital punishment, compared with 72 of the general population").

typically unreflective, the *lex talionis* notwithstanding. As a result, although prospective jurors who generally disfavor the death penalty might well be rehabilitated through careful questioning by defense counsel, they are likely to be removed simply because their misgivings about the death penalty emanate from a deeper source. Yet, including jurors who are cautiously hesitant to impose the ultimate sentence is essential to ensuring that the jury's sentencing decision will represent "the conscience of the community," a key value in having juries impose sentence in death penalty cases in the first place.[39] Use of videotaped voir dire records to enable real scrutiny of claimed *Witherspoon* error on appeal or in post-conviction proceedings would promote fairer and more reliable capital trials.

Another area where deferential review has watered down the defendant's substantive rights is in the protection against the prosecution's discriminatory use of peremptory challenges. In *Batson v. Kentucky*,[40] the Court appeared to hold out the prospect that prosecutors' use of peremptory challenges to keep capital juries all-white would be subjected to real scrutiny. Before long, however, appellate courts began to retreat from meaningful examination of the "race-neutral" reasons proffered by prosecutors in defense of their strikes against minority venirepersons. The Supreme Court completed this cycle in 1995, holding that such race-neutral reasons need not even be "plausible," much less "persuasive," so long as they are facially race-neutral.[41] With this holding, it appears that *Batson*, too, may be little more than a memory.[42]

Just as it could revitalize *Witherspoon*, the use of

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39. The Supreme Court has repeatedly employed capital jury sentencing verdicts as an index of whether society's "evolving standards of decency" permit the death penalty to be imposed in specific circumstances, or for a specific type of offender. *E.g. Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (noting that in making such determinations, the Court has "[relied] largely on objective evidence such as the judgments of legislatures and juries").

40. 476 U.S. 79 (1986).

41. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

42. *See e.g.* Michelle Mahony, Student Author, *The Future Viability of Batson v. Kentucky and the Practical Implications of Purkett v. Elem*, 16 Rev. Litig. 137, 172 (1997) ("[U]ntil it chooses to reexamine the issue, the Court has jeopardized the practical viability and effectiveness of *Batson* in the courtroom."); *id.* at 171 (noting that of fifty-four reported federal decisions citing *Purkett* as of September, 1996, only one resulted in a reversal on *Batson* grounds).

videotaped voir dire records could give new life to *Batson*. In particular, that technology would permit the appellate court to meaningfully test a prosecutor's claim that she struck a particular juror based on his demeanor (for example, because the juror somehow nonverbally communicated hostility, disinterest, sympathy with the defendant, or stupidity).[43] Without a videotaped record, such claims are completely insulated from review on appeal. It is not even possible for the defendant to demonstrate "clear error" on the trial court's part in accepting such a justification, since the written record by its very nature cannot reflect the presence or absence of such attitudes on the part of the prospective juror. With a videotaped record, however, the reviewing court could at least monitor whether some behavior of the juror appeared to be consistent with the prosecutor's defense.

Video technology would also increase the utility of "comparative analysis" (that is, considering whether the prosecutor's *failure* to exercise strikes against white members of the venire with similar characteristics reveals a racially discriminatory motive). A videotaped record of voir dire would improve "comparative analysis" because the reviewing court could make much more reliable judgments about whether the different jurors were genuinely comparable.

History and experience provide an especially strong justification for employing such technology in the context of capital cases, where the cruel legacy and continuing influence of racial discrimination are undeniable.[44]

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43. These are among the most popular purportedly race-neutral reasons proffered by prosecutors in defense of strikes against prospective jurors of minority race. *See e.g. State v. Martinez*, 999 P.2d 795, 800 (Ariz. 2000) (sympathy for defendant); *State v. Mukhtaar*, 750 A.2d 1059, 1069 (Conn. 2000) (educational background); *Jones v. State*, 523 S.E.2d 402, 408 (Ga. App. 1999) (sympathy for defendant); *Howard v. State*, 534 S.E.2d 202 (Ga. App. 2000) (persons in juror's neighborhood had shown hostility in other cases); *People v. Morales*, 719 N.E.2d 261, 268 (Ill. App. 1999) ("hostility"); *State v. Campbell*, 997 P.2d 726, 733 (Kan. 2000) (sympathy for defendant); *State v. Hobley*, 752 S.2d 771, 783 (La. 1999) ("disinterested"); *State v. Johnson*, 621 S.2d 1167, 1171 (La. App. 1993) ("disinterested"); *Bolton v. State*, 752 S.2d 480, 483 (Miss. App. 1999) (educational background).

44. *See e.g.* Richard C. Dieter, Death Penalty Information Center, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* <http://www.essential.org/dpic/racerpt.html> (last updated June 1998); Stephen B. Bright, *Discrimination, Death And Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995).

B. Closing Argument Issues

Few capital cases are reversed for error during closing argument, at either phase of trial. In part, this is due to the pernicious influence of *Darden v. Wainwright*,[45] in which the Supreme Court effectively signaled that it would tolerate extreme or outrageous conduct by the prosecution in closing argument,[46] even in capital cases, so long as the argument did not render the entire trial fundamentally unfair.[47] Though *Darden* does not compel such an analysis, many appellate courts take the further step of analyzing complaints about closing argument on a statement-by-statement basis, rather than considering the collective harm from repeated improprieties. Finally, in most jurisdictions, if the trial court sustained an objection to the improper argument and/or gave a curative instruction, the presumption of harmlessness on appeal is nearly conclusive.[48]

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45. 477 U.S. 168 (1986).

46. The prosecutor in *Darden* engaged in a series of improprieties, including characterizing the defendant as an "animal," 477 U.S. at 180 n. 11; arguing that the Department of Corrections was culpable in having released the defendant, and thus, the death penalty was the only way to avoid the possibility that he might be released again, *see id.* at 180, 180 nn. 9-10; and making emotional pleas that he wished the victim had "blown [Darden's] face off" and that he could see Darden "sitting here with no face, blown away by a shotgun," *id.* at n. 12. After recounting changes in the defendant's appearance between the time of the offense and trial, the prosecutor told the jury that the only change in appearance Darden had not made was to "cut his throat." *Id.*

47. The Court did not reverse because the argument was not deemed sufficiently egregious to demonstrate a violation of due process, the applicable standard for review of claims of prosecutorial misconduct in closing argument. 477 U.S. at 180 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974): "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'").

48. For example, in a federal habeas action reviewing an Arkansas prosecution for multiple rapes, *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), the court considered the petitioner's claim that the prosecutor's misconduct in alluding to a medical examination not in evidence at trial was so inflammatory that no admonition could have removed the taint. *See id.* at 1329-30. Defense counsel's timely objection had been sustained by the trial court, but counsel did not request further relief either in the form of admonition or mistrial. *See id.* at 1330. The Eighth Circuit concluded that the prosecutor's argument was "highly improper." *Id.* However, the court observed:

> Defense counsel's failure to seek a corrective instruction or to move for mistrial is, however, critical to our conclusion that Petitioner was not denied due process by the prosecutor's objectionable comments. While we think the comments at issue were likely injurious, we are unwilling to say that the trial judge was

Trial lawyers feel acutely the unfairness of such legal presumptions, because they understand how inadequately a "cold" record may reflect the dynamics of closing argument, especially at the penalty phase where the defendant's life is at stake. For several different reasons, the availability of video records will improve the accuracy of appellate courts in reviewing such claims of error.

First, appreciating the emotional pitch of closing argument is essential to assessing the real impact of a particular improper line of argument. Because prosecution witnesses, even members of the victim's family, generally are not permitted to offer a direct opinion about what sentence the defendant should receive, closing argument presents the only opportunity for the prosecutor to articulate her demand that the jury impose death and to attempt to impart the necessary emotional momentum to carry the jury through its task.[49] It is tempting to cross the line that separates "hard blows" from foul ones, and many prosecutors do so in response to the need to motivate the jurors to vote for death. It is too easy for a reviewing court, faced with a prosecutor whose penalty-phase closing argument characterized the defendant as "deviate," "cold," "mean," "twisted," "callused," "cold-blooded," "depraved," and "malignant" to conclude in the abstract that these descriptions

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constitutionally required to admonish the jury absent a request from defense counsel. We therefore find no constitutional error.

Id.

Typically, appellate courts will hold that the remedy of mistrial is only appropriate when a curative instruction or admonition would be inadequate to cure the prejudice resulting from improper closing argument. *Holbird v. State*, 775 S.W.2d 893 (Ark. 1989). When trial courts do give curative instructions on request by counsel, appellate courts generally find the corrective measures adequate to defuse the prejudice. *See e.g. Dandridge v. State*, 727 S.W.2d 851, 853 (Ark. 1987) (prosecutor's reference to the accused as a "gross animal" was deemed cured by the trial court's admonition to jurors to disregard the remark); *King v. State*, 877 S.W.2d 583, 585-86 (Ark. 1994) (prosecutor's argument that jurors should consider their neighbors' children, their own children and grandchildren in child sexual assault prosecution, a violation of the prohibition against the "golden rule" argument, was properly addressed by trial court's admonition that jurors were not to place themselves in the position of the victim).

49. Numerous studies indicate that, despite supposed popular enthusiasm for the death penalty, it remains extremely traumatic and difficult for anyone to choose deliberately to end the life of another human being. Jurors thus must be subjected to certain time-tested psychological techniques in order to overcome this ingrained reluctance to kill. *See generally* Lieutenant Colonel Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Little, Brown & Co. 1995).

did not render the entire proceeding "fundamentally unfair" within the meaning of that phrase in *Darden*. But it is difficult to imagine any fair-minded judge—after watching and listening to these increasingly passionate arguments, gradually rising to the final thundering crescendo that "the defendant is a man who deserves to die, and I dare say that when his appointed day and hour arrives, you can put your ear down to Mother Earth and hear the gates of hell clang shut on his murderous soul"—concluding that the defendant had a fair penalty hearing.[50]

In addition to giving reviewing courts an accurate appreciation of the emotional context of the closing arguments, a video record can also show how events in the courtroom unfolded during argument—whether, for example, the prosecutor employed gestures or movements that, in combination with the words of the argument itself, created unfair prejudice against the defendant. In one Texas case involving the murder of a state trooper, the prosecutor's penalty-phase closing argument contained references easily interpreted as directing the jurors' attention to the twenty uniformed troopers seated in the courtroom audience, and as demanding that the jurors be mindful of the troopers' wants and needs in determining sentence. He asked repeatedly for the jury to give the death penalty "on behalf of law enforcement," once adding, "You know, I tell my people—and they're still here and I'm proud of them for coming over—I tell them, 'Look, guys, society's a jungle out there and the only thing that separates us from the criminals is the police.' And I tell my officers, 'You guys may be broke as the Ten Commandments but you're the last strand between the fox and the chicken.'" He reminded the jury that its verdict would "tell law enforcement what you think about it." Finally, after telling a parable about how one could "make a difference" by returning beached starfish to the sea: "You can also make a difference to [the deceased trooper], who gave his life trying to protect us. Yes, to that starfish and *to these starfish* you

50. Remarks from prosecutor's penalty-phase closing argument in Trial Tr. vol. IV, 1236-1237, in *State v. Barber*, No. F80-6421-LJ (Tex. Crim. Ct. 3d Dist. 1980). Barber's conviction and sentence of death were affirmed by the Texas Court of Criminal Appeals, 757 S.W.2d 359 (1988). The issue of impropriety in the final argument was not addressed in the published opinion, not having been raised by counsel on direct appeal. Barber has since been executed.

do make a difference." The Texas Court of Criminal Appeals, reviewing the cold record, expressed uncertainty as to how many officers were present and whether the prosecutor's argument was intended to direct the jurors' attention to them, and, in the face of that doubt, was unwilling to find that the defendant's rights had been violated.[51] A videotaped record could have made plain that the prosecutor was invoking the presence of the uniformed officers as an integral part of his demand that the jury impose the death penalty.

In addition, videotaped records would make it possible to resolve meaningfully the occasional disputes that arise concerning how statements by the court or counsel were inflected or intoned, and what significance such nuances carry. During closing arguments in another Texas death penalty trial, the prosecutor admonished jurors that "even if somebody voluntarily took drugs or voluntarily became intoxicated," such actions did not "excuse [the crime or] lessen the punishment." Defense counsel promptly objected that the prosecutor's remark implied "that they cannot consider that as a mitigating factor when, in fact, that is the law." The trial court responded, "Of course what he says is true, but the Jury may consider that as a mitigating factor if they wish." The prosecutor then said, "Thank you, your Honor," leading defense counsel to ask, "Is my objection overruled?" The court responded in the affirmative: "Yes, it is overruled."

Exactly how the jury understood this tangled exchange is unclear: Who was the "he" whose view, according to the trial court, was "true?" One obvious interpretation is that the prosecutor's complaint that voluntary intoxication was not a mitigating circumstance as a matter of law was endorsed by the trial judge (because defense counsel's objection was overruled). Indeed, any other interpretation makes incoherent the trial judge's use of "but" to introduce the clause "the Jury may consider that . . . ." A competing, though less plausible, possibility is that the jury perceived that the trial court overruled

51. *Howard v. State*, 941 S.W.2d 102, 117–18 (Tex. Crim. App. 1996) (en banc); *see also Powell v. State*, 897 S.W.2d 307, 317 n. 7 (Tex. Crim. App. 1994) (noting, but not reaching, the appellant's complaint that the presence of "about eighty-five uniformed and armed police officers" in the courtroom during penalty-phase closing arguments, in a case involving the murder of a police officer, created a "lynch-mob atmosphere").

defense counsel's objection because the prosecutor's original argument was properly understood as directed to the evidence, not the law. The bottom line is that the interpretation of this exchange was pivotal to the integrity of the defendant's death sentence, and it was impossible to reach a reliable conclusion about the meaning of these comments in the absence of a videotaped record. It is not uncommon for cold records to present similar disputes, disputes that would disappear if the court had access to the participants' inflections, intonations, gestures, and so on.[52]

C. Ineffective Assistance of Counsel

Ineffective assistance of counsel is one of the most frequently raised arguments in federal petitions for habeas corpus, but one that rarely results in the reversal of the underlying sentence or conviction.[53] Despite the growing recognition that court-appointed lawyers often lack the experience and funding necessary to properly investigate, research, and try death penalty cases,[54] courts continue to prove

52. This exchange appears in Trial Tr. vol. XV, 467, in the trial record of *State v. Johnson*, tried in the 132nd District Court of Scurry County, Texas, in 1986. Johnson's conviction and sentence of death were affirmed by the Texas Court of Criminal Appeals in *Johnson v. State*, 773 S.W.2d 322 (1989). Ironically, Johnson's death sentence was upheld on direct appeal by a 5-4 vote of the Supreme Court, after the majority concluded that the penalty-phase jury charge was sufficient to permit consideration of mitigating evidence. *See Johnson v. Texas*, 509 U.S. 350 (1993). Given the character of the prosecutor's closing argument, one must gravely doubt whether the jurors in fact understood their Eighth Amendment obligation to consider all evidence in mitigation as part of determining whether a death sentence was warranted. Johnson was executed in 1997.

53. Anne M. Voigts, Student Author, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1118 (1999).

54. *See generally* Bright, *supra* n. 44, and sources cited therein; *see also* Raymond Bonner & Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. Times (May 14, 2000) (detailing various instances in which trial counsel's inadequate experience and lack of funding for necessary investigators contributed to the conviction and execution of several Texas prisoners); Sara Rimer & Raymond Bonner, *On The Record: Capital Punishment in Texas; Bush Candidacy Puts Focus on Executions*, N.Y. Times (May 14, 2000) (noting that Charles Baird, a former judge of the Texas Court of Criminal Appeals, "along with other judges, law enforcement officials and death penalty lawyers, agrees that some of the conditions that have created doubt elsewhere and have sent innocent people to death row in other states—especially bad lawyers, a lack of resources for lawyers to mount a vigorous defense and overzealous prosecutors—exist in abundance in Texas"). Although Texas is receiving most of the current media attention due

reluctant to address even the most egregious breaches of professional norms.[55]

In part, this lack of oversight results from the fact-intensive nature of ineffective assistance claims. Under *Strickland v. Washington*,[56] a convicted defendant must prove not only that his counsel's performance was deficient, but also that this deficient performance prejudiced his case. With nothing but a cold record on which to judge counsel's performance, as well as the trial as a whole, federal courts defer first to the lawyer in assessing whether her performance was deficient, and second to the judge who witnessed the trial in determining whether any deficient performance prejudiced the defendant.[57] In either case, this

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to the upcoming election, death penalty procedures in other states suffer similar problems. *See e.g.* Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois*, Chi. Tribune 1 (Nov. 14–18, 1999) (five-part series describing various problems with Illinois's death penalty regime, which later contributed to governor's decision to impose a moratorium on executions in that state).

55. For a review of some of the most appalling facts, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835, 1857-61 (1994), noting numerous cases in which courts have refused to find counsel ineffective despite proof that counsel was addicted to drugs while "preparing" for trial, that counsel failed to investigate and/or present any mitigating evidence at the penalty phase, and that counsel forfeited claims of constitutional error that admittedly could have spared the defendant's life on appeal. In one case described by Bright, the Fifth Circuit reversed the district court's grant of habeas based on ineffective assistance because counsel's four-sentence closing "argument" at the penalty phase was a "dramatic ploy" which, "[h]ad the jury returned a life sentence . . . might well have been seen as a brilliant move." *Id.* at 1858-59 (discussing *Romero v. Lynaugh*, 884 F.2d 871, 875, 877 (5th Cir. 1989), in which the court noted that the counsel's closing consisted entirely of "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.").

In some circuits, it is not even clear that counsel's sleeping through portions of a trial will meet the *Strickland* standard. *E.g. Prada-Cordero v. U.S.*, 95 F. Supp. 2d 76, 81-82 (D.P.R. 2000) (noting relevant decisions from the Ninth and Second Circuits, but cautioning that a sleeping attorney should not lead courts to presume that a defendant was prejudiced because (1) "it may not be unusual" for attorneys to sleep during trial; (2) attorneys might pretend to be asleep as a "strategic tool"; and (3) "unscrupulous practitioners," aware of a presumption of prejudice based on sleep, might sleep during trial solely in order to provide their clients with an argument for a new trial).

56. 466 U.S. 668, 687 (1984).

57. *See U.S. v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998) ("[T]he conduct of examination and cross-examination is entrusted to the judgment of the lawyer, and an appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken."); *see also Hernandez v. Senkowski*, 1999 WL 1495443 at *15 (E.D.N.Y. Dec. 29, 1999) (disposing of a claim of ineffective assistance based on failure to introduce certain recorded statements by noting that "defense counsel, who had the opportunity to assess the demeanor and credibility of the various

deference goes beyond traditional notions of crediting the court below, and serves largely to insulate counsel's performance from any independent review, at either the district or circuit court level.

For example, when the state of Georgia tried James Messer for capital murder, his court-appointed attorney made no opening statement, presented no case-in-chief, objected to none of the fifty-three items of evidence offered by the State, failed to cross examine fourteen of the state's twenty-three witnesses and conducted only cursory cross-examination of the other nine.[58] The Eleventh Circuit Court of Appeals, addressing Messer's conviction on federal habeas, concluded that these "statistical observations" did not establish deficient performance, much less the prejudice required by *Strickland*.[59] Even on a cold record, at least two United States Supreme Court justices found Messer's representation "egregiously unprofessional" and "piteously deficient,"[60] but Georgia executed Messer in July 1988. Of course, the fact that the appellate court found only "statistics" on which to base its decision is a situation not entirely within Messer's control. Without the benefit of a videotaped record, appellate courts admittedly have difficulty evaluating qualitative claims of error. As one court noted in denying one ineffective assistance claim, partially because counsel had died since trial and so was unable to testify about the representation, "Reviewing courts are left only with the cold record and [appellant's] assertions."[61]

In assessing whether particular conduct "prejudiced" the defendant, appellate courts suffer from a similar lack of information. Indeed, the Fifth Circuit Court of Appeals has

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witnesses, was in the best position to assess whether the introduction of the [evidence] would assist or harm the petitioner's defense"); *May v. Collins*, 955 F.2d 299, 314 (5th Cir. 1992) (holding that the state court's adjudication of an ineffective assistance claim should be presumed correct despite the fact that no evidentiary hearing was held because "the judge did not have to make this decision on the cold record alone; rather, he could compare the information presented in the various affidavits against his own firsthand knowledge of the trial").

58. *Messer v. Kemp*, 760 F.2d 1080, 1089 (11th Cir. 1985).

59. *Id.* at 1089–90.

60. *Messer v. Kemp*, 474 U.S. 1088, 1088-89 (1986) (Marshall & Brennan, JJ., dissenting from denial of certiorari).

61. *Crowe v. South Dakota*, 484 F.2d 1359, 1361 (8th Cir. 1973) (brackets in original) (quoting *Crowe v. South Dakota*, 356 F. Supp. 777, 778 (D.S.D. 1973)).

repeatedly endorsed the practice of some state courts of resolving ineffective assistance claims solely on the basis of affidavits rather than live testimony, in part because state judges ruling on habeas claims are often the same judges who presided over the original trial.[62] In the Fifth Circuit's view, this familiarity lends added credibility, because at least the judge can "compare the information presented in the various affidavits against his own firsthand knowledge of the trial."[63] A more reliable approach, however, would involve at least an independent review of counsel's conduct at trial, preferably conducted by a court with no stake in justifying the original outcome. With the benefit of videotaped trial records, such independent review could become a reality, at least for future death row inmates.

III. CONCLUSION

In each of these different areas, videotaped records challenge the necessity of deferring to a trial court's first-hand observations. In most garden-variety appeals, however, deference by a reviewing court to trial court determinations may be justified by policy values other than necessity, such as finality and judicial economy. No technological advance is likely to endanger traditional standards of review in that context.

In less than routine cases, however, such as when a defendant's life is at stake, videotaped records may provide some opportunity for much-needed improvement in appellate oversight of state court proceedings. Certainly some judges may balk at the idea of increasing the scrutiny they currently give to state court death cases, particularly in light of Congress's apparent bent in the opposite direction. But no law forbids, and, indeed, common sense and common decency demand, that before the judiciary authorizes an execution, it should hear the protests of the condemned in full, and accept or reject those claims based on the most accurate information possible. Because videotaped records provide one way in which to preserve this crucial information, and thereby improve the accuracy of

62. *May*, 955 F.2d at 314.

63. *Id.*

appellate and post-conviction review, appellate courts should welcome their introduction. In so doing, the courts should acknowledge that the policy of deference in the death-penalty context should yield to the imperative of correcting fundamentally unfair judgments.