ARTICLES

"SAME AS IT EVER WAS":* WHY AUDIO-VIDEO RECORDINGS IN AND OF TRIAL COURT PROCEEDINGS SHOULD NOT CHANGE THE STANDARD OF APPELLATE REVIEW

Eric J. Magnuson†

Samuel A. Thumma‡

At a hypothetical trial, the only eyewitness testimony to the events in question is presented to the jury by video deposition. In that same hypothetical trial, the only other evidence that directly addresses key disputed facts is a video recording taken from a security camera showing an individual generally resembling the defendant in height and build, but which does not clearly show any facial features or other identifying characteristics. Assuming these pieces of evidence are properly admitted, on appeal, what is the appropriate standard of review to be applied to the factual determinations of the court or jury based on that evidence?

---

* TALKING HEADS, ONCE IN A LIFETIME (Sire Records 1980). The views expressed are solely those of the authors, who wish to thank Judge Thumma's Law Clerks Kristen Iteen and Yanneli Llamas for their cite checking help and Brent Murcia and Jennifer Gerboth for their proofreading and editing assistance.

† Partner, Robins Kaplan LLP, Fellow, past President of the American Academy of Appellate Lawyers, and former Chief Justice of the Minnesota Supreme Court.

‡ Judge, Arizona Court of Appeals, Division One, Phoenix, Arizona, having previously served as a Judge on the Arizona Superior Court in Maricopa County for nearly five years.

At first blush, the answer seems obvious. The law has long recognized as distinct the questions of admissibility on the one hand and the weight to be given admitted evidence on the other. Trial judges determine admissibility by considering things like foundation, relevance, reliability, probative value, and danger of unfair prejudice or related mischief under the rules of evidence.[1] Trial judges also address special admissibility rules applicable to writings, recordings, and photographs (including video evidence).[2] On the other hand, the jury (or, for a bench trial, the trial judge as finder of fact) ultimately decides whether evidence that is admitted is persuasive.

But what if a video is the key evidence at trial, or the only record of the trial? Are the traditional rules of deference accorded to the trial court and jury by the appellate courts inapplicable when the reviewing courts can see evidence as readily as the judge or jury in the first instance?

A decade ago, given the expanding use of high-quality audio-video evidence, we mused about these questions but did not suggest an answer.[3] For at least a generation, others have similarly mused, both before[4] and

1. *See, e.g.*, FED. R. EVID. 401–03, 702–03. For ease of reference, this article generally relies on procedural rules used in federal courts, recognizing there are numerous state counterparts.

2. *See* FED. R. EVID. 1001–08.

3. Eric J. Magnuson & Samuel A. Thumma, *Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future*, 15 J. APP. PRAC. & PROCESS 111, 120–22 (2014).

4. *See, e.g.*, *id.* at 122 (quoting George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. APP. PRAC. & PROCESS 229, 248 (2000)); Eric J. Magnuson & Michael W. Kaphing, *Ethical Issues on Appeal in a Technological World*, FOR DEF., Nov. 2013, at 18, 22 (citing Mary E. Adkins, *The Unblinking Eye Turns to Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law*, 15 J. TECH. L. & POL'Y 65 (2010); Bernadette Mary Donovan, *Deference in a Digital Age: The Video Record and Appellate Review*, 96 VA. L. REV. 643 (2010)); Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251 (2000); Robert C. Owen & Melissa Mather, *The Decisionmaking Process: Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411 (2000).

after we did,[5] without a definitive suggested answer. In this article, we suggest an answer to this decades-long musing: the format of evidence being challenged or providing the basis for a challenge on appeal should not alter the standard of appellate review.

We offer this answer not for fear of technology in courts, which is here to stay and will expand in the future.[6] Nor do we offer this answer based on history, tradition, or even vague Latin phrases that permeate the legal system.[7] Rather, based on decades of experience in both the trial and appellate courts, our answer is that appellate courts should review issues regarding audio-video evidence the same way they have reviewed documentary evidence broadly (and historically), which best recognizes the vital role that trial judges serve in providing finality in legal disputes. Our answer is consistent with the United States Supreme Court's repeated refrain that, in litigation, a trial on the merits is "the 'main event, . . . rather than a tryout on the road.'"[8] For these reasons, the deferential standard of appellate review of audio-video evidence should remain the "same as it ever was."[9]

---

5. *See* Jack M. Sabatino, *The Appellate Digital Deluge: Addressing Challenges for Appellate Review Posed by the Rising Tide of Video and Audio Recording Evidence*, 96 TEMP. L. REV. 11, 40, 40 n.98 (2023); *see generally* Pierre H. Bergeron, *Rethinking Appellate Standards of Review for Video Evidence*, 56 CT. REV.: J. OF AM. JUDGES ASS'N 140 (2020).

6. To the contrary, we have advocated for expanded use of technology in the courts for years. *See generally* Magnuson & Thumma, *supra* note 3; Samuel A. Thumma et al., *Post-Pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. REV. F. 1 (2022); Samuel A. Thumma et al., *Report and Recommendations of the Arizona Task Force on Court Management of Digital Evidence*, 13 WASH. J. L. TECH. & ARTS 165 (2018) [hereinafter *Report and Recommendations*]; Samuel A. Thumma & Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUT. & HIGH-TECH. L. J. 1 (1999).

7. *Cf.* Samuel A. Thumma & Roger E. Brodman, *On "Vague Latin Phrases" and Criminal Confessions: Corpus Delicti, Trustworthiness/Corroboration and the Federal Rules of Evidence*, 114 NW. J. CRIM. L. & CRIMINOLOGY 105 (2024).

8. Shoop v. Twyford, 596 U.S. 811, 819 (2022) (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

9. TALKING HEADS, *supra* note *.

This article begins with a brief summary of how technology has changed the court record in recent years so that the current record now often includes digital evidence—and, more specifically, audio and video recordings of pretrial events and, at times, the trial itself. The article then discusses the traditional standards of appellate review of trial court decisions, and how the technology-based changes to the court record raise questions about application of some of these traditional standards. The article continues with some comparatively recent examples of how appellate courts that have been asked to apply the traditional standards of review have struggled when presented with a court record containing (or comprised of) audio and video recordings. The article concludes with various reasons why the technology-based changes to the court record (particularly the use of audio and video recordings) should not change the traditionally deferential standards appellate courts have used when asked to assess fact-based determinations and findings of fact by trial courts (and related admissibility determinations), even when based primarily or solely on audio-video evidence.

I. THE CHANGING NATURE OF THE COURT RECORD

Until the last few decades, the court record was comprised of three basic components: (1) filings and orders, (2) transcripts, and (3) evidentiary materials such as exhibits and physical evidence.[10] These physical components of the court record "were expected to follow the case wherever it went," including being shipped to the appellate courts for review when there was an appeal.[11] "At times, this record filled boxes or even rooms and was generally referred to as 'the cold record' (or worse)."[12]

For most courts, recent technology advances have changed these three components of the court record.

10. *Report and Recommendations*, *supra* note 6, at 173.

11. *Id.*

12. Magnuson & Thumma, *supra* note 3, at 120.

"Filings by the parties are, quite often, electronic, not in paper form, and may include materials that never existed in paper form."[13] "Similarly, the transcript of court proceedings frequently is provided in a digital file or recording. The digital transcript then becomes part of the court record kept by the court, or submitted to the court on appeal, with the digital file following the case wherever it goes," as with the electronic filings.[14] And there is a more recent push for digital evidence court portals, where exhibits used at court hearings (other than physical things like guns and drugs) are provided electronically, through a digital evidence portal, to be used at court hearings and trials and then become part of the court record, likewise following the case wherever it goes.[15]

Directly relevant to the standard of appellate review issue addressed here, technology has also changed how the transcript is kept. Technology has similarly changed what evidence a trial judge or jury considers. At times, instead of a word-by-word written transcript of a court proceeding serving as the record of that proceeding, an audio-video recording is used.[16] As we noted a decade ago:

> [U]sing on appeal video recordings of trials (instead of a court reporter's written trial transcript as part of "the cold record") changes the complexion of the

13. *Report and Recommendations*, *supra* note 6, at 174.

14. *Id.*

15. *Id.* at 176–77, 178 n.10 (discussing CaseLines, one such digital evidence solution, which British courts were using at the time and, more recently, Thomson Reuters offers as Case Center); *see also A Single System to Collect, Manage, and Review Digital Evidence*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/case-center (last visited Jan. 26, 2024).

16. *See* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1050 n.133 (2007) ("Several state court appellate procedure rules now allow video or digital transcripts to constitute the record on appeal." (citing Briana E. Chua, Comment, *Arizona's Digital Record & Its Use on Appeal*, 35 ARIZ. ST. L.J. 605 (2003)) (discussing Alabama, Arizona, Kentucky, Ohio, Tennessee, and Vermont rules)). Other states have experimented with a completely video record but have not fully embraced it. *See generally* Frederick K. Grittner, *The Recording on Appeal: Minnesota's Experience with Videotaped Proceedings*, 19 WM. MITCHELL L. REV. 593 (1993).

> record. Among other things, use of a video recording instead of a written trial transcript can present witness credibility issues historically not addressed on appeal. Even grainy videos or audio recordings allow an appellate court to consider inflection, pauses, and tone, things never addressed by the appellate court in the paper world. As technology increases, facial expressions, ticks and even perspiration of witnesses, parties, counsel, and others will be available for review by appellate courts accepting video recordings instead of written trial transcripts. But is that what technology properly should be doing to appeals?[17]

To date, the number of appeals involving audio-video recordings of trials seems small. But there has been a huge explosion of audio-video evidence received at trials and other court hearings.

Sound recordings used as evidence in court are said to have begun in 1906,[18] with motion pictures first used in courts about a decade later.[19] Much has happened since then, both with how recordings are made and how recordings are used in courts. As noted just a few years ago, "the recent exponential growth of digital evidence used in court, from devices such as smart-device cameras, body-worn cameras, and other public and private surveillance equipment" has caused a surge in the use of

---

17. Magnuson & Thumma, *supra* note 3, at 120.

18. Peter P. Roper, *Sound Recording Devices Used as Evidence*, 9 CLEV.-MARSHALL L. REV. 523, 523 (1960) ("In 1906, some three decades after Thomas Alva Edison sketched out on paper his 'talking machine,' an enterprising plaintiff, disturbed by the clatter of trains going by his residence, went to court with sound recordings of the noise and, offering them in evidence, won his case against the railroad." (citing Boyne City, G. & A. R. Co. v. Anderson, 108 N.W. 429 (Mich. 1906))); *see also id.* at 524 (noting, in 1960, that "[t]he present status of reported case law in this field [use of recordings in court], while dating back as far as 1906, is of relatively recent development." (citation omitted)).

19. James P. Barber & Philip R. Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1019–20 (1974) ("Motion pictures were introduced into the courtroom shortly after the turn of the [nineteenth] century"); *see also id.* at 1020 n.8 ("According to one commentator, the year was 1915 and the case was [the British case] Glyn v. Weston Feature Film Co. Ltd., 114 L.T.R. (n.s.) 354 (1915)." (citing Pierre R. Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235, 235, 235 n.1 (1965))).

audio-video recordings at trials and other court hearings.[20]

The proliferation of audio-video evidence at trials and otherwise in court raises a raft of issues that are beyond the scope of this article. Clearly, the traditional rules of foundational reliability are challenged by technology. This is particularly true in light of the rapid development of artificial intelligence, and the apparent ease with which audio-video and photographic evidence can be manipulated—with "deep fakes" (among other things) raising difficult issues at trial, severely testing trial judges.[21] One need only watch an ad for a new phone camera that allows the user to substitute different facial expressions on the subject of the photograph so they look "better," or to erase from a photo unwanted images in the background, to understand the perils that can be present in relying on audio-video or photographic evidence at trial.[22] The standard of appellate review of the decision of the trial court to admit such evidence should be unchanged—was there an abuse of discretion based on all

20. *Report and Recommendations*, *supra* note 6, at 168 (citations omitted); JOINT TECH. COMMITTEE, JTC RESOURCE BULL.: MANAGING DIGITAL EVIDENCE IN COURTS, at ii (2016) (noting "exponential increase in the quantity of digital evidence"); JOINT TECH. COMMITTEE, JTC RESOURCE BULL.: MANAGING DIGITAL EVIDENCE IN COURTS, at 3 (noting "explosion of digital video evidence. . . . The submission and use of digital evidence of all kinds in state and local courts has surged over the last few years.").

21. *See generally, e.g.*, Maura R. Grossman, Paul W. Grimm, Daniel G. Brown & Molly Xu, *The GPTJudge: Justice in a Generative AI World*, 23 DUKE L. & TECH. REV. 1 (2023); Rebecca A. Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 HASTINGS L.J. 293 (2023); Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9 (2021).

22. *See, e.g.*, J. D. Biersdorfer, *How to Make Your Smartphone Photos So Much Better*, N.Y. TIMES (Jan. 11, 2023), https://www.nytimes.com/2023/01/11/technology/personaltech/smartphone-cameras-tips.html; *Behind the Snapshot: How the Galaxy S21's AI Improves Your Photos in the Blink of an Eye*, SAMSUNG NEWSROOM (Feb. 2, 2021), https://news.samsung.com/global/behind-the-snapshot-how-the-galaxy-s21s-ai-improves-your-photos-in-the-blink-of-an-eye.

the facts presented?[23] However, it would seem that a trial court's determination, based on all of the proceedings, that a video is not a reliable representation of actual facts should be accorded great deference.[24] The overarching goal is, as always, to ensure that the finder of fact—particularly a jury—hears truthful evidence and not manufactured evidence.

That, however, is a subject for an entirely different article. Here, our discussion assumes that proper foundation has been laid for audio-video or photographic evidence, and reliability established. But that does not answer the question of how such evidence should be treated on appeal.

Exhibits containing audio-video recordings of significant events (such as recordings of criminal interrogations; body-worn camera recordings; dash-cam recordings; security, surveillance, and drone recordings; not to mention video depositions) that are played at court hearings (including trials) allow the trial court audience (be it judge or jury) to better understand a case and allow a party with the burden of proof to better meet that burden. But those same recordings are then part of the court record available to an appellate court. As with audio-video recordings of trials, should that capability to review the same recording by an appellate court alter the traditional standard of review that applied when the court record was "the cold record" consisting of paper filings, transcripts, and exhibits?

---

23. "Abuse of discretion must be eye-popping, neck-snapping, jaw-dropping egregious error." Roger W. Badeker, *Wide as a Church Door, Deep as a Well: A Survey of Judicial Discretion*, J. KAN. BAR ASS'N, Mar.–Apr. 1992, at 33.

24. *See* Fisher v. Roe, 263 F.3d 906, 912 (9th Cir. 2001) ("To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." (quoting Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988))), *overruled on other grounds by* Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003).

II. THE HISTORICAL STANDARDS OF APPELLATE REVIEW

Looking to the federal courts as a proxy for all courts, and stated simply, there are four traditional standards of appellate review: (1) de novo; (2) clearly erroneous; (3) abuse of discretion; and (4) plain error or exceptional circumstances review.[25] The first three are the most common, and the focus of this article.

In applying those three standards, again stated simply, an appellate court (1) owes no deference to legal decisions, which are reviewed de novo; (2) owes great deference to factual decisions, subject to the clearly erroneous standard of review, where "an appellate court will sustain any reasonable or not unreasonable decision that could be reached by reasoning from the evidence"; and (3) reviews discretionary decisions (which are capable of differing definitions), using a standard quite deferential to the trial court.[26]

At the margin, each of these three categories—described as sounding "deceptively simple"—may, indeed, defy "easy analysis."[27] For our purposes, however, the focus is on issues where an appellate court traditionally owes deference to a trial court's ruling, either as a factual finding or as a discretionary ruling on a request to admit or exclude evidence.[28] It is those instances in which, at

---

25. *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (4th ed. 2010); Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267 (2005); *see also* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 48 (2000); FED. R. EVID. 103(e) ("A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved."). For largely historical reasons, Arizona uses fundamental error instead of the federal court plain error standard. *See* ARIZ. R. EVID. 103(e) ("A court may take notice of an error affecting a fundamental right, even if the claim of error was not properly preserved."); *see also* ARIZ. R. EVID. 103 comment to 2012 amendment ("The substance of subsection (e) . . . , which refers to 'fundamental error,' has not been changed to conform to the federal rule, which refers to 'plain error,' because Arizona and federal courts have long used different terminology in this regard.").

26. Davis, *supra* note 25, at 48–49.

27. *Id.* at 49.

28. *See* Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997) ("The standard of review applicable to the evidentiary rulings of the district court is abuse

least at the core, the change in the court record to include audio-video recordings has created pressure for appellate courts to judge evidence de novo—something that historically could not be done on a "cold record" made up of paper and things.

III. EXAMPLES OF APPELLATE COURTS STRUGGLING WITH TRADITIONAL DEFERENTIAL STANDARDS OF REVIEW WHEN CONSIDERING AUDIO-VIDEO RECORDINGS

As in the world before audio-video recordings, an appellate court owes deference to factual findings by trial courts as well as discretionary evidentiary decisions.[29] Such decisions include factual rulings during and after bench trials, evidentiary rulings during trial (other than Confrontation Clause issues), and pretrial rulings on things like motions in limine and motions to suppress in criminal cases (resolving arguments that statements made during an interrogation were involuntary or that a pretrial identification was suggestive).[30]

An apex court—the United States Supreme Court or a state supreme court—could potentially change these time-worn standards of appellate review from the historically deferential standards to either de novo or

---

of discretion." (citing United States v. Abel, 469 U.S. 45, 54–55 (1984))). We do not address the de novo standard of appellate review applicable to Sixth Amendment Confrontation Clause issues. *See, e.g.*, United States v. Greenlaw, 84 F.4th 325, 355 (5th Cir.), *petition for cert. filed*, 84 F.4th 325 (U.S. Dec. 12, 2023) (No. 23-631); United States v. Shih, 73 F.4th 1077, 1097 (9th Cir.) (citing United States v. Vera, 770 F.3d 1232, 1237 (9th Cir. 2014)), *petition for cert. filed*, 73 F.4th 1077 (U.S. Dec. 27, 2023) (No. 23-693); United States v. Counts, 39 F.4th 539, 543 (8th Cir. 2022) (citing United States v. Brun, 416 F.3d 703, 706 (8th Cir. 2005)).

29. *See* Davis, *supra* note 25, at 48, 66.

30. *See, e.g.*, Hess Corp. v. Schlumberger Tech. Corp., 26 F.4th 229, 233 (5th Cir. 2022) ("Factual findings made during a bench trial deserve 'great deference.'" (quoting Guzman v. Hacienda Recs. & Recording Studio, Inc., 808 F.3d 1031, 1036 (5th Cir. 2015))); *see also* United States v. Barton, 909 F.3d 1323, 1335 (11th Cir. 2018) ("The virtues of deference to trial courts in evidentiary determinations are many."); United States v. Reaves, 796 F.3d 738, 741 (7th Cir. 2015) ("Due to the fact-specific nature of motions to suppress, we give special deference to the trial court that presided over the motion." (citing United States v. Jackson, 300 F.3d 740, 745 (7th Cir. 2002))).

something akin to de novo,[31] in addressing appeals involving audio-video recordings in that specific court system or jurisdiction. But as we demonstrate below, even if that is permissible, it would be a poor policy change for a variety of reasons.

As we noted a decade ago, appellate courts are reviewing recordings played for the jury at trial, for reasons that include assessing their possible impact on the jury and the sufficiency of the evidence to support a verdict.[32] That use, so far as it goes, is akin to what an appellate court would do in checking the cold record for the same purposes.

But courts have gone a great deal further in considering audio-video evidence on appeal. A few examples show how, when they can view the same video evidence as the trial judge did, appellate courts have struggled in applying deferential standards to factual findings and discretionary decisions—starting with the United States Supreme Court in addressing a summary judgment ruling, where the appellate standard of review is de novo, but the test is whether a reasonable jury could view proffered evidence in a certain way.

---

31. Some commentators have noted that "constitutional mandates pertaining to the decisionmaking authority vested in juries, the guarantee of due process of law, and the bar against twice being tried for the same criminal offense, significantly define appellate scrutiny of certain claims of trial-level error." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 3 (3d ed. 2018). The primary thesis in the present article is that appellate courts should not (even if they could) change the discretionary standard of review given the change in the historically "cold" record to include audio-video recordings.

32. Magnuson & Thumma, *supra* note 3, at 121, 121 n.33 (citing People v. Meza, No. 2–10–0001, 2011 WL 10136040, at *2 (Ill. App. Ct. Aug. 11, 2011) ("On the video, although Aguilar's statements are barely audible, the detective's statements in response clearly imply that Aguilar implicated defendant as the shooter."); Foley v. Haney, 345 S.W.3d 861, 862 (Ky. Ct. App. 2011) ("The audiotape recording of [the] hearing is barely audible; however, based on what we can hear, the hearing officer reviewed medical records/reports related to the inmate's injuries and stated that he had a report based on confidential information." (alteration in original)); State v. Williams, No. 2012 KA 0147, 2012 WL 4335435, at *7 (La. Ct. App. Sept. 21, 2012) ("Our review of the 911 recording reveals that Milliken was in a great deal of pain as he lay dying and had difficulty speaking. . . . Barely audible, Milliken says he was stabbed.")).

In *Scott v. Harris*, the United States Supreme Court considered the appropriateness of the district court denying the defendant's motion for summary judgment in an excessive force claim by the plaintiff, where a high-speed car chase resulted in the plaintiff being paralyzed when the defendant caused the plaintiff's car to crash.[33] The record included "a videotape capturing" those events.[34] In an interlocutory appeal, the Eleventh Circuit affirmed, concluding that the defendant's actions could constitute deadly force, and the United States Supreme Court granted review and reversed.[35]

The majority in *Scott* concluded the defendant was entitled to summary judgment, stating that "[t]he videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals."[36] In a sharply worded dissent, however, Justice Stevens criticized the majority's interpretation of the videotape, stating that "[r]elying on a *de novo* review of a videotape . . . , buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals."[37]

Looking to other examples, a Westlaw Generative AI search revealed differing approaches taken by state appellate courts in a few jurisdictions when addressing audio-video evidence on appeal. These scattered decisions highlight the importance of how the issue is framed.

In *People v. Sykes*, the Illinois Court of Appeals concluded that "whether it was proper for the State's witness to narrate the contents of a video when he had no personal knowledge of the events portrayed on the video is a legal issue which does not require an exercise of discretion, fact finding, or evaluation of credibility," and

33. Scott v. Harris, 550 U.S. 372, 372 (2007).
34. *Id.*
35. *Id.* at 376.
36. *Id.* at 378.
37. *Id.* at 389 (Stevens, J., dissenting).

reviewed the issue de novo.[38] Both before and after the Illinois Court of Appeals decision in *Sykes*, however, the Illinois Supreme Court stated that reviewing the admissibility of audio-video evidence on appeal is "pursuant to the highly deferential abuse-of-discretion standard";[39] "[u]nder this standard, an abuse occurs when the trial court's ruling is fanciful, unreasonable or when no reasonable person would adopt the trial court's view."[40] Given these declarations by the Illinois Supreme Court, it does not appear that *Sykes* altered the general abuse-of-discretion standard for appellate review of decisions addressing the admissibility of audio-video recordings.

New Jersey opinions provide an even more instructive example of the struggle. In *State v. Diaz-Bridges*, a 2012 opinion reversing a trial court's decision suppressing statements made by a criminal defendant as contrary to his right to remain silent, a majority of the New Jersey Supreme Court (a 3–2 opinion, with two justices not participating) noted the deference historically given to a trial court's factual findings on appeal.[41] The majority, however, added that:

> [W]hen the trial court's sole basis for its findings and conclusions is its evaluation of a videotaped interrogation, there is little, if anything, to be gained from deference. In that circumstance, as we have observed, appellate courts are not confined to a review of a transcript nor obliged to defer to the trial court's findings, but may consider the recording of the event itself. When the trial court's factual findings are based only on its viewing of a recorded interrogation that is equally available to the appellate court and are not dependent on any testimony uniquely available to the trial court, deference to the trial court's interpretation is not required. Appellate courts need

38. People v. Sykes, 972 N.E.2d 1272, 1277 (Ill. App. Ct. 2012) (citation omitted); *accord* People v. Lewis, No. 4-21-0273, 2022 WL 3041988, at *3 (Ill. App. Ct. Aug. 2, 2022) (unpublished decision following *Sykes*).

39. People v. Smith, 215 N.E.3d 891, 900. (Ill. 2022).

40. People v. Taylor, 956 N.E.2d 431, 437 (Ill. 2011) (citations omitted).

41. State v. Diaz-Bridges, 34 A.3d 748, 760–61 (N.J. 2012), *overruled by* State v. S.S., 162 A.3d 1058 (N.J. 2017).

> not, and we will not, close our eyes to the evidence that we can observe in the form of the videotaped interrogation itself.[42]

So, for a time at least, the New Jersey Supreme Court appeared to adopt a sort of de novo standard of appellate review applicable to audio-video evidence. That would not last long. In 2017, just five years later, the New Jersey Supreme Court reversed course in *State v. S.S.*, another criminal case involving a recorded interrogation,[43] writing:

> We now conclude—after weighing all sides of the issue—that a standard of deference to a trial court's factfindings, even factfindings based solely on video or documentary evidence, best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts. We reject the de novo standard introduced in [2012 in State v. Diaz-Bridges] . . . for the following reasons.[44]

The reasons offered in *State v. S.S.* were (1) the role of trial judges as factfinders and their "ongoing experience and expertise in fulfilling" that role; (2) "certain tangible benefits" of a deferential standard, including that a de novo review would result in "the highest appellate court's factual findings prevail[ing], not because they are necessarily superior but because they are last"; (3) that a de novo review of such evidence would undercut "the legitimacy of . . . [trial] courts in the eyes of litigants"; and (4) an abuse-of-discretion standard still had rigor, noting appellate "[d]eference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record."[45]

In reaching this conclusion, the court noted—but rejected—apparently conflicting approaches elsewhere:

---

42. *Id.* at 761 (citations omitted).

43. *See S.S.*, 162 A.3d at 1060.

44. *Id.* at 1069.

45. *Id.* at 1069–70 (second alteration in original) (citations and internal quotation marks omitted).

> [A] number of jurisdictions favor a de novo approach. See, e.g., People v. Madrid, 179 P.3d 1010, 1014 (Colo. 2008) ("[W]here the statements sought to be suppressed are audio- and video-recorded, . . . we are in a similar position as the trial court to determine whether the statements should be suppressed."); State v. Akuba, 686 N.W.2d 406, 418 (S.D. 2004) ("'[B]ecause we had the same opportunity to review the videotape . . . as the trial court,' we review [it] de novo." (second alteration in original) (quoting State v. Tuttle, 650 N.W.2d 20, 34 n.11 (S.D. 2002))); State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000) (stating that "rationale underlying a more deferential standard of review is not implicated" when court's fact-findings in suppression hearing based solely on video evidence).[46]

The New Jersey Supreme Court captured these various cases in a comprehensive manner and correctly quoted what those opinions state. The context for those statements, however, is telling.

Madrid, which apparently remains good law in Colorado,[47] noted that under Colorado law, "[w]hen the controlling facts are undisputed, the legal effect of those facts constitutes a question of law which is subject to *de novo* review."[48] The South Dakota Supreme Court noted the comparatively unique proceedings leading to the *Akuba* appeal: "the trial court only made conclusions of law or mixed findings of fact and conclusions of law on this issue. We have no findings of historical fact to which the clearly erroneous standard applies. Therefore, our

46. *Id.* at 1069.

47. *See* People v. Barrera, 517 P.3d 61, 62 n.2 (Colo. 2022) ("We derive the following observations from our review of the patrol car's dash camera footage, which shows the view of the road ahead, the patrol car's speed, when the brakes were applied, and when the emergency lights were activated. *See* People v. Madrid, 179 P.3d 1010, 1014 (Colo. 2008) (noting that where there is an audiovisual record and there are no disputed facts outside the recording controlling the issue of suppression, this court sits in a similar position as the trial court and therefore may independently review the recording).").

48. *Madrid*, 179 P.3d at 1014 (internal quotation marks omitted) (quoting People v. Valdez, 969 P.2d 208, 211 (Colo. 1998)).

task involves an application of the facts to the law, and that review is de novo."[49]

The relevant portion of *Tuttle*, quoted by *Akuba*, was in a footnote of an opinion joined by one other justice, in a case where three other justices concurred in part and dissented in part; the two justices wrote that "[i]t is also important to point out that the dissenters are incorrect in implying that we are to give deference to the trial court's finding of voluntariness," adding the voluntariness of a confession is a question of law and "[o]ur standard of review is *de novo*, not only on general principles, but also because we had the same opportunity to review the videotape of the defendant's statement as the trial court."[50]

And *Binette* unremarkably held "that when a trial court's findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness."[51] So, it is at least somewhat unclear whether these cases actually stand for propositions that conflict with the discretionary standard of appellate review adopted in *S.S.*

The New Jersey Supreme Court in *S.S.* does provide a comprehensive discussion of the issue, rejecting the de novo review standard the same court had adopted just five years earlier in *Diaz-Bridges* and holding that the traditional deferential standard of appellate review should apply to all such discretionary determinations, including those relying on and addressing the admissibility of audio-video evidence.[52]

49. State v. Akuba, 686 N.W.2d 406, 417–18 (S.D. 2004) (citation omitted).
50. State v. Tuttle, 650 N.W.2d 20, 34 n.11 (S.D. 2002).
51. State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000).
52. State v. S.S., 162 A.3d 1058, 1065–70 (N.J. 2017).

IV. REASONS TO RETAIN THE TRADITIONAL DEFERENTIAL STANDARD OF APPELLATE REVIEW WHEN CONSIDERING AUDIO-VIDEO EVIDENCE ON APPEAL

As stated in the introduction, we are advocates for the proposition that the format of evidence being challenged on appeal should not alter the standard of appellate review. In other words, appellate courts should continue to apply the deferential clearly erroneous and abuse-of-discretion standards (as applicable) when considering audio-video evidence, just as when they considered the "cold record" of printed transcripts and exhibits. Why? We offer a dozen reasons (actually a baker's dozen), starting with why a dual standard—where audio-video evidence is, on appeal, given closer scrutiny than evidence in the "cold record"—is not an appropriate alternative.

First, using a single, comparatively clear, and well-known appellate standard for all evidence regardless of format—the clearly erroneous standard for factual findings and the abuse-of-discretion standard for admissibility of evidence—facilitates ease of application and predictability, continuing the application of standards used in appeals for decades, if not centuries.

Second, using a single standard prevents similarly situated evidence from being treated differently. If, in fact, an audio-video recording is to be reviewed de novo on appeal, while a "cold record" of the same evidence is reviewed under a deferential standard (clearly erroneous or abuse of discretion), the form in which the evidence is presented at trial would have meaning and perhaps be determinative. As an example, focusing on a deposition used in a civil trial: rulings regarding an audio-video recording of a deposition played to the jury would be reviewed de novo, while excerpts read to the jury would be reviewed using a deferential standard.

Third, relatedly, using the same standard of review prevents the standard of review from driving the type of evidence used at trial. For example, whether to play a recorded deposition at trial or whether to read excerpts

from the transcript should not turn on which method would yield the most forgiving (or most inquiring) standard of review on appeal. Similarly, the type of evidence offered at a pre-trial hearing on a motion to suppress or a voluntariness hearing in a criminal trial should not be driven by concerns about what standard of review an appellate court might use months or years later when asked to review the ruling.

Fourth, in an appeal where most of the trial evidence was live testimony but one portion was an audio-video recording, if two different standards of appellate review are used, how can the appellate court sort out the various types of evidence in a way that would fairly assess where deference should be owed and where it should not?

Fifth, relatedly, where both live and recorded testimony is provided at a jury trial, the trial judge properly considers it all in addressing evidence-based objections and motions, including post-trial motions such as a motion for new trial (based on the sufficiency of the evidence or otherwise). In such a trial, which happens quite often these days, how could a trial judge account for a different standard of review applicable depending upon the form of the evidence? And would the type of deference owed on appeal to a trial judge's post-trial rulings turn on, or be influenced by, divergent standards depending upon the types of evidence considered at trial? And if so, how?

Turning, then, to reasons for why a deferential standard should apply to all forms of evidence in appeals:

Sixth, Seventh, Eighth, Ninth, *and* ***Tenth,*** a textual commitment for deferential appellate review of findings of fact by judges. For nearly 40 years, Federal Rule of Civil Procedure 52 has required deferential appellate review for findings of fact made in bench trials.[53] In 1985, Rule 52 was amended to state that "[f]indings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

53. *See* FED. R. CIV. P. 52.

judge the credibility of the witnesses."[54] Although later restyled, the substance of this provision has remained the same ever since then.[55] In adopting this deferential standard, the Advisory Committee noted an unresolved Circuit split, where some opinions had not applied a "clearly erroneous" appellate standard for factual findings based on documentary evidence because "the appellate court is in as good a position as the trial court to review a purely documentary record."[56] The Advisory Committed cogently summarized the policy reasons behind a single, clear, uniform standard of appellate review:

> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be

54. FED. R. CIV. P. 52(a) (1985) (emphasis added) (amended 2007).

55. Rule 52 was amended in 2007 "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." FED. R. CIV. P. 52 advisory committee notes 2007 amendment. The relevant text currently appears in Rule 52(a)(6). *See* FED. R. CIV. P. 52(a)(6) ("*Setting Aside the Findings*. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Arizona's rules use identical text in civil cases, *see* ARIZ. R. CIV. P. 52(a)(6), and substantially similar text in family court cases, where all trials are bench trials. *See* ARIZ. R. FAM. L.P. 82(a)(5) ("*Setting Aside the Findings*. Findings of fact must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the credibility of witnesses.").

56. FED. R. CIV. P. 52 advisory committee notes 1985 amendment (citations omitted). The Committee also noted that "[s]ome courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous." *Id.* (citing Marcum v. United States, 621 F.2d 142, 144–45 (5th Cir. 1980)).

> promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.[57]

These policy reasons—which we count as five: stability; judicial economy; furthering legitimacy of the fact-finding function at trial; avoiding appellate retrial of factual issues; and properly allocating judicial authority—apply with equal force to the review of audio-video evidence on appeal. Stability and consistency, not to mention the institutional imperative of narrowing the scope of an appellate court's inquiry, all support the application of a deferential standard of appellate review of audio-video evidence, not only for findings of fact after bench trials, but also for appeals following jury trials involving audio-video evidence.

Eleventh *and* ***Twelfth,*** recognizing that expertise and efficiency support deferential standards of review regarding trial court consideration of evidentiary issues, regardless of the form of the evidence. As the United States Supreme Court noted in a somewhat different context, the trial judge is in a superior "position to make determinations of credibility."[58] But, the Court continued:

> The rationale for deference to the original finder of fact is not limited to [that] superiority . . . . The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.[59]

---

57. *Id.*

58. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

59. *Id.* at 574–75.

Finally, as the United States Supreme Court "has stated in a different context, the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road."'"[60] Appellate courts need to keep clearly in mind the institutional role of deference. It is not a question of ability to weigh audio-video evidence as much as it is the propriety of appellate courts assuming that role. A deferential review of all trial evidence (including audio-video evidence), and of decisions determining what trial evidence is admissible, helps ensure that the trial, and trial court proceedings, are indeed the "main event" in resolving litigation.

V. CONCLUSION

The format of evidence being challenged on appeal should not alter the standard of appellate review. Audio-video evidence should be treated the same way that appellate courts treat every other type of evidence, with the standard of review being clearly erroneous (for factual findings) or an abuse of discretion (for rulings on admissibility). New technology has not changed these standards, and for the reasons set forth herein, should not do so. The deferential standard of appellate review should remain the "same as it ever was."[61]

60. *Id.* at 575 (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

61. *See* TALKING HEADS, *supra* note *.