WILL VIDEO KILL THE TRIAL COURTS' STAR?

HOW "HOT" RECORDS WILL CHANGE THE APPELLATE PROCESS

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I. INTRODUCTION

Recent innovations in technology have allowed appellate courts unprecedented access to information from the lower courts that previously was not available. While this access can allow appellate judges to connect to the record on a deeper, more thorough level, it also leaves them open to charges that they are overstepping their traditional deference to the lower courts' factfinder function. What happens to such deference when the appellate courts have access to a "multimedia" record that mimics the first-hand experience of the trial judge? Should traditional appellate deference to cold records be ignored in an age of hot records? Or should such evidence be more appropriately introduced before a jury acting as the factfinder?

The Supreme Court's recent decision in *Scott v. Harris*[2] was based explicitly on the Court's viewing of a videotape of a car chase in Georgia that occurred on March 29, 2001.[3] Prior to the installation of video recorders in police cars the Court would have relied upon the court of appeal's and the district court's description of the car chase, as well as the description in the briefs filed by petitioner and respondent. Instead, the Justices reviewed the videotapes and based their decision on them, reversing both the trial and appellate court's decisions.[4] Viewing the video footage of the chase "made a difference" in the opinion and the vote of one Justice in particular,[5] and affected the views of other Justices. It is, therefore, crucial to analyze the impact that such technological innovations will have on the appellate process.

This Article will argue that appellate courts overstep their roles by examining evidence that previously would not have been available and suggests ways that courts can carefully negotiate the pitfalls of modern technological advances. Part One discusses the various standards of review available to appellate courts. Part Two analyzes the decision in *Scott v. Harris*, and Part Three examines prior instances of the Supreme Court acting as a factfinder. Part Four concludes with suggestions for how appellate courts should handle technological changes.

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[2] Scott v. Harris, 550 U.S. 372 (2007) [hereinafter "*Harris III*"].

[3] Videotape: Police Pursuit of Respondent Victor Harris (Mar. 29, 2001) (on file with the Supreme Court), *available at* http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb; *see Harris III*, 550 U.S. at 372, 374, 378–80.

[4] *See Harris III*, 550 U.S. at 376, 378–81, 386.

[5] *Id.* at 387 (Breyer, J., concurring).

II. STANDARDS OF REVIEW

There are three standards of appellate review: *de novo*, clearly erroneous, and abuse of discretion.[6]

De novo review occurs most frequently with questions of law and with mixed questions of fact and law.[7] Such review does not require the appellate judge to show deference to the lower court judge because she is considering the issue as though for the first time.[8]

The clearly erroneous standard, on the other hand, allows the appellate court to closely review findings of fact by lower court judges.[9] The appellate court must determine not just that the judge is wrong in findings of fact, but that she is clearly and indisputably wrong. Federal Rule of Civil Procedure 52(a)(6) discusses this standard: "[f]indings 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."[10] The Rule clearly states that appellate courts should give "regard" to the trial court's determination on facts known only to the trial court. Reversal should occur only if the appellate court "is left with the definite and firm conviction that a mistake has been committed."[11]

Under Rule 52(a)(1) the trial court "must find the facts specially and state its conclusions of law separately."[12] The Rule allows the findings of fact and conclusions of law to be "stated on the record after the close of the evidence or it may appear in an opinion or a memorandum of decision filed by the court."[13] However, this Rule does not apply to summary judgment motions.[14]

The abuse of discretion standard is deferential to the trial

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6 BLACK'S LAW DICTIONARY 11, 106, 269 (8th ed. 2004).

7 *See* 61 Am. Jur. *Trials* § 39 (2008) (showing legal and mixed questions that would warrant a *de novo* review); *see* 5 Am. Jur. 2d *App. Rev*. §§ 631, 646 (2008).

8 BLACK'S LAW DICTIONARY, *supra* note 5, at 106.

9 *See id.* at 269.

10 FED. R. CIV. P. 52(a)(6).

11 United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

12 FED. R. CIV. P. 52(a)(1).

13 *Id.*

14 FED. R. CIV. P. 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.").

court.[15] Generally, courts review discretionary rulings under this standard.[16] To reverse, the appellate court must conclude that the ruling was outside the generally accepted range of discretion that is appropriately left to the trial judge.[17] The appellate court is not supposed to correct a decision just because the appellate court thinks it would have made the opposite decision from the trial judge.

III. *SCOTT V. HARRIS:* A CASE STUDY IN THE USE OF VIDEO EVIDENCE

A. Case History

The Supreme Court's opinion in *Scott v. Harris* [hereinafter *Harris III*] reveals some pitfalls in using modern technology. In this case, Timothy Scott, a Georgia deputy, engaged in a car chase with Victor Harris.[18] Harris, who was initially clocked at seventy-three miles per hour in a fifty-five mile per hour zone, was pursued by Scott and other officers and successfully evaded the police until Scott undertook a maneuver designed to stop Harris' car.[19] Harris, however, lost control of his car as a result of Scott's actions and crashed, rendering him a quadriplegic.[20] The entire car chase was videotaped from Scott's police cruiser, as well as other officers' cars.[21] The police video recorders are automatically activated when an officer engages his flashing lights and siren.[22]

Harris sued, alleging excessive force resulting in an unreasonable seizure under the Fourth Amendment.[23] Scott filed a motion for summary judgment based on qualified immunity,

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[15] *See* Krempetz v. State, 872 N.E.2d 605, 614 (Ind. 2007) (stating that the Indiana Supreme Court will give great deference to the lower court unless there is a finding of an abuse of discretion); 5 Am. Jur. 2d *App. Rev.* § 623 (2008).

[16] 5 Am. Jur. 2d *App. Rev.* § 623 (2008).

[17] *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 11.

[18] *Harris III*, 550 U.S. at 372, 374–75.

[19] *Id.* Scott was approved to engage in a Precision Interception Technique ("PIT") maneuver, which is a police interception technique designed to bring speeding cars safely to a stop. Scott was not trained in this maneuver. Although Scott requested permission to perform a PIT maneuver, he ultimately did not perform it. Harris v. Coweta County, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *2–*3 (N.D. Ga. Sept. 25, 2003) [hereinafter "*Harris I*"].

[20] *Harris III*, 550 U.S. at 375.

[21] *Id.* at 395 n.7 (Stevens, J., dissenting).

[22] *Harris I*, 2003 WL 25419527, at *1.

[23] *Harris III*, 550 U.S. at 375.

which the district court denied, finding that there were "material issues of fact on which the issue of qualified immunity turns."[24] The district court granted summary judgment to Scott related to Harris' Fourteenth Amendment claims and his state tort claim that Scott acted negligently or maliciously in hitting his car.[25] Ultimately, the district court's ruling left several claims pending for trial: Harris' Fourth Amendment claim against Scott and Mark Fenninger, another Coweta County police officer; municipal liability claims for failure to train the officers in PIT maneuvers against the county; and negligence claims against the county based on the actions of Scott and Fenninger.[26]

The district court made no mention of having viewed the videotapes of the chase in its opinion, merely noting that the officer "turned on his lights and siren, which activated his video camera."[27] The district court also noted that Harris' "version of the facts is quite different" from Scott's version, but that the court had to view the facts in the light most favorable to Harris, as the nonmovant.[28] Therefore, the district court's factual findings included that Harris was driving a car registered to him at his current address, going faster than the speed limit, and refused to slow down or pull over when Deputy Clinton Reynolds flashed his blue lights, prompting Reynolds to initiate the chase.[29] Harris then sped up, passing vehicles and running a red light before activating his turn signal to turn into a deserted parking lot.[30] Reynolds, who had radioed his pursuit but not the reason for the pursuit, was then joined by Scott, who attempted to block Harris' exit from the parking lot.[31] Scott put his car directly in Harris' path, and Harris unsuccessfully attempted to avoid hitting Scott's cruiser, causing damage to Scott's car as Harris entered the highway.[32] The highway pursuit was led by Scott, while other officers blockaded intersections to prevent pedestrians and other motorists from becoming involved in the chase.[33] Mark Fenninger, Scott's supervisor, granted Scott

[24] *Harris I*, 2003 WL 25419527, at *1, *6.
[25] *Id.* at *7, *10.
[26] *Id.* at *12.
[27] *Id.* at *1.
[28] *Id.* at *1, *6.
[29] *Id.* at *1.
[30] *Harris I*, 2003 WL 25419527, at *1.
[31] *Id.*
[32] *Id.*
[33] *Id.* at *2.

permission to perform the PIT maneuver based on his concern for the safety of others in the area.[34] In light of these facts as presented by Harris, the district court denied summary judgment.[35] The court of appeals affirmed in relevant part, holding that Harris' version of the facts left open a genuine issue of material fact better resolved by a jury than on a summary judgment motion.[36]

B. Summary Judgment Standard

Federal Rule of Civil Procedure 56 governs summary judgment motions seeking a judgment on the movant's claim or defense.[37] Such a judgment can terminate the litigation without a trial.[38] Therefore, the trial judge must decide "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[39] If the judge finds "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law[,]" the motion for summary judgment is granted.[40]

Summary judgment can be used to resolve a portion of the case. In those instances, the trial judge "should, to the extent practicable, determine what material facts are not genuinely at issue[,]" and "then issue an order specifying" such.[41] The facts that have been reckoned without substantial controversy "must be treated as established in the action" and the trial proceedings will not further examine those facts.[42] In *Harris I*, the district court granted summary judgment for several of Harris' claims, leaving only those claims "which present[ed] sufficient disagreement to require submission to a jury."[43] The Supreme Court has held that:

> Rule 56 must be construed with due regard not only for the rights

[34] *Id.* Scott ultimately did not perform the PIT maneuver. *Id.*

[35] *Id.* at *6–*7, *10, *12.

[36] Harris v. Coweta County, 433 F.3d 807, 815, 821–22 (11th Cir. 2005) [hereinafter "*Harris II*"].

[37] FED. R. CIV. P. 56.

[38] 73 Am. Jur. 2d *Summary Judgment* § 1 (2008).

[39] FED. R. CIV. P. 56(c).

[40] *Id.*

[41] FED. R. CIV. P. 56(d)(1).

[42] *Id.*

[43] *Harris I*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *6 (N.D. Ga. Sept. 25, 2003).

> of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[44]

The movant carries the initial burden of proving that the nonmovant has no genuine issue of material fact to support his contentions.[45] Once the movant has met that burden, the burden shifts to the nonmovant to show that a genuine issue of material fact exists, which bars summary judgment.[46] "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."[47] The court then decides "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[48]

The Supreme Court has also held that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[49] The Court went on to say that "[i]f reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed."[50] Because the "summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard[,]" the inquiry is similar.[51] The difference between the two standards is that "'summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.'"[52]

Because the case was before the appellate court on a summary judgment motion, there were no factual findings by a judge or jury for the court to rely on.[53] When appellate courts review summary judgment motions, their standard of review is "'in the light most favorable to the party opposing the [summary

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[44] Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

[45] *Id.* at 323.

[46] Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

[47] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citations omitted).

[48] *Id.* at 252.

[49] *Id.* at 249.

[50] *Id.* at 250–51 (citing Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)).

[51] *Id.* at 251 (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983)).

[52] *Id.* (quoting *Bill Johnson's Rests., Inc.*, 461 U.S. at 745 n.11).

[53] *Harris III*, 550 U.S. at 378.

judgment] motion."[54] Under this standard, according to the court of appeals, Harris' version of the facts must be adopted.[55] Based on Harris' version, the court of appeals found that he:

> [R]emained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . ..Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[56]

The court of appeals specifically noted that it had viewed "[t]he videos introduced into evidence" and that they "show little to no vehicular (or pedestrian) traffic[.]"[57] Therefore, the court concluded that "an objective view of the facts of this case" made a grant of summary judgment inappropriate.[58] The issues whether Scott was qualified for immunity from suit[59] and whether his actions were excessively forceful and resulted in an unreasonable seizure in violation of the Fourth Amendment were "disputed issue[s] to be resolved by a jury."[60]

C. Qualified Immunity Standards

Qualified immunity is "an *immunity from suit* rather than a mere defense to liability[] and. . .is effectively lost if a case is erroneously permitted to go to trial."[61] Therefore, immunity questions are immediately appealable.[62] The Supreme Court laid out the test to determine whether qualified immunity is or is not

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[54] *Id.* (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

[55] *Harris II*, 433 F.3d at 811.

[56] *Id.* at 815–16 (internal citations omitted).

[57] *Id.* at 819 n.14.

[58] *Id.* at 814.

[59] Government employees acting in their official capacity are granted qualified immunity for their actions unless those actions violate constitutional or statutory rights of others of which the officials should have been reasonably aware. To be eligible for qualified immunity, the government official must first prove that he was "acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Id.* at 811 (citations omitted). Once the official has established her eligibility, the burden shifts to her opponent to prove that "qualified immunity is not appropriate." *Id.* at 811–12.

[60] *Harris II*, 433 F.3d at 815.

[61] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (italics in original).

[62] *Id.* at 526–27.

appropriate in *Saucier v. Katz*.[63] The court, "in the light most favorable to the party asserting the injury," must analyze whether the "facts alleged show the officer's conduct violated a constitutional right[.]"[64] The Court recently held in *Pearson v. Callahan* that *Saucier*'s test is not mandatory, allowing judges the discretion to choose to follow *Saucier* or not.[65] Additionally, the Supreme Court has held that courts should not be unduly "rigid" in applying the analysis, but should consider whether the law gave the official "fair warning" that his conduct was unconstitutional.[66] If the court's analysis shows that there are genuine issues of material fact, summary judgment on the issue of qualified immunity is not appropriate.[67]

Neither the district court or the court of appeals granted Scott qualified immunity for his actions, finding genuine issues of material fact whether his actions violated Harris' constitutional rights. However, Scott's petition for a writ of certiorari to the Supreme Court stated that because the pursuit was recorded, "there are few material issues of fact."[68] Despite this, the description of the pursuit made in the statement of facts in Scott's certiorari petition and Harris' response are markedly different.[69] Both documents reference the videotape as admitted

[63] Saucier v. Katz, 533 U.S. 194, 201 (2001). Interestingly, the Court granted certiorari in *Pearson v. Callahan*, on March 24, 2008, and included in the order a direction for the parties to "brief and argue the following question: 'Whether the Court's decision in Saucier v. Katz, 533 U.S. 194 [121 S. Ct. 2151, 150 L. Ed. 2d 272] (2001) should be overruled?'" 552 U.S. ___, 128 S. Ct. 1702, 170 L. Ed. 2d 512 (2008). It is very rare for the Court to *sua sponte* request that parties brief and argue whether one if its precedents should be overruled. The last time such an order appeared was in Payne v. Tennessee, *cert. granted* 498 U.S. 1080 (1991), in which the Court requested review of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989). Justice Stevens dissented, finding that such a *sua sponte* request "unwise and unnecessary." *Payne*, 498 U.S. at 1076.

[64] *Saucier*, 533 U.S. at 201. Only if the court finds such a violation may it take the next step and ask "whether the right was clearly established . . . in light of the specific context of the case." *Id.*

[65] Pearson v. Callahan, 555 U.S. ___ (2009). In its reasoning, the Court noted that *Saucier* often failed to prevent lawsuits from which the defendant had qualified immunity because the cases were so "fact-bound that the decision provides little guidance for future cases" and specifically cited to *Harris III*. *Id.* at 12.

[66] Hope v. Pelzer, 536 U.S. 730, 739, 741 (2002).

[67] *Harris I*, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *6 (N.D. Ga. Sept. 25, 2003) (citing *Anderson*, 477 U.S. at 251–52).

[68] Petition for Writ of Certiorari at 3, *Harris III*, 550 U.S. 372 (2007) (No. 05-1631).

[69] *Compare id.* at 5 (describing Scott's maneuver that led to Harris' crash as

evidence available to the Supreme Court for viewing.[70] Both documents also cite to the videotape to bolster their arguments.[71]

D. Oral Arguments

The videotape was discussed extensively in oral argument, particularly with Harris' counsel, Craig Jones. Jones frequently pointed out to the Justices that the facts before the Court, which should be only those facts as found by the district court and the court of appeals,[72] were not the facts the Justices extrapolated from viewing the videotape.[73] Justice Scalia asked if the Court was bound by the factual finding "[e]ven if having watched the tape, there is no way that [the lower court's] factual finding can be accurate?"[74] Jones said the Court was bound by that factual finding, unless it wanted to reverse *Johnson v. Jones*[75] and *Mitchell v. Forsyth*,[76] because it must only determine the legal issues on appeal.[77]

During oral argument, Justice Scalia likened watching the videotape of the chase to viewing the car chase scene in "The French Connection."[78] Justice Alito noted that, to him, the videotape showed that Harris "created a tremendous risk" to others on the road.[79] Justice Breyer also noted that the tape

"tapp[ing] the rear bumper" of Harris' car) *with* Brief for the Respondent at 9, *Harris III*, 550 U.S. 372 (2007) (No. 05-1631) (describing the same maneuver as "Scott spe[eding] up his patrol car and ramm[ing] it into Harris' vehicle") for just one example.

[70] *See* Petition for Writ of Certiorari, *supra* note 68, at 3 n.1; Brief for the Respondent, *supra* note 68, at 4–5 n.2.

[71] *See* sources cited, *supra* note 70. Indeed, both briefs rely on the same section of the tape as proof of the quotations in note 67.

[72] *See* Transcript of Oral Argument at 40–41, 45, *Harris III*, 550 U.S. 372 (2007) (No. 05-1631); s*ee also supra* notes 5, 8.

[73] Transcript of Oral Argument, *supra* note 72, at 26–28, 40.

[74] *Id.* at 41.

[75] Johnson v. Jones, 515 U.S. 304, 313 (1995) (holding that "the District Court's determination that the summary judgment record in this [qualified immunity] case raised a genuine issue of fact concerning [police officers'] involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant [appellate jurisdiction] statute[]" and, therefore, was not immediately appealable).

[76] *Mitchell*, 472 U.S. at 524–27, 536 (holding that the Attorney General was entitled to qualified immunity from suit and that the court of appeals' finding that he was not immune was appealable).

[77] Transcript of Oral Argument, *supra* note 72, at 41 and accompanying text.

[78] Transcript of Oral Argument, *supra* note 72, at 28.

[79] *Id.* at 27.

showed the pursuit from Scott's perspective,[80] making it harder to find Scott's actions unreasonable. Justice Ginsburg said that "[a]nyone who has watched that tape" would find that Harris "endanger[ed] the lives and safety of others" in "a situation fraught with danger."[81] These comments show the impact the videotape had on the Justices' opinion of the car chase.

Justice Breyer spent a great deal of time asking how he was supposed to reconcile the trial court's factual findings with what he saw on the videotape. He put forward his description of the chase and then asked Jones if he was "supposed to pretend I haven't seen that?"[82] Instead of answering the question, Jones disputed Justice Breyer's description of the contents of the tape ("Well, I didn't see that."),[83] and suggested that Justice Breyer should view the tape again, which the Justice agreed to do.[84] Justice Breyer still wondered how to reconcile what he saw on the tape with what the trial court said, and Jones only offered that the Justice should "apply the law."[85]

When Scott's counsel, Philip Savrin, returned for rebuttal Justice Breyer promptly asked him the question he had posed to Jones, phrasing it in the old Marx joke: "Who do you believe, me or your own eyes?"[86] Savrin, citing *Ornelas v. United States*,[87] suggested that the Court has previously only "given deference" to "historical facts" and as legal questions about those facts are reviewed *de novo*, the Court would not owe any deference to the trial court's findings of fact.[88] Justice Scalia, however, did not find that information helpful because he thought the chase was a "historical fact."[89]

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[80] *Id.* at 4.

[81] *Id.* at 40.

[82] *Id.* at 44.

[83] *Id.*

[84] Transcript of Oral Argument, *supra* note 72, at 45.

[85] *Id.*

[86] *Id.* at 54.

[87] Ornelas v. United States, 517 U.S. 690, 697–98 (1996) (holding that "*de novo* review . . . provid[es] law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified . . . .'") (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

[88] Transcript of Oral Argument, *supra* note 72, at 54–55.

[89] *Id.* at 55. It has been said that jurors have an advantage in assessing historical facts over judges "whose habits and course of life give [judges] much less experience of the workings of passion in the actual conflicts of life." Maher v. People, 10 Mich. 212, 221 (1862) (*overruled by* People v. Sullivan, 586 N.W.2d 578, 583 (Mich. App. 1998)).

E. The Scott v. Harris Decision

Justice Scalia, writing the opinion for the Court, pointed out the "added wrinkle" of the videotape.[90] The Supreme Court held that the court of appeals "should have viewed the facts in the light depicted by the videotape."[91] In Justice Scalia's opinion, "the videotape tells quite a different story[]" from the court of appeals' description of the chase.[92] In the video, he saw Harris "racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast[,] . . . forc[ing] cars traveling in both directions to their respective shoulders to avoid being hit[,] . . . run[ning] multiple red lights[,]. . . . [and] placing police officers and innocent bystanders alike at great risk of serious injury."[93] Finding that Harris' "version of events is so utterly discredited by the record that no reasonable jury could have believed him," the Supreme Court reversed the court of appeals and granted Scott summary judgment.[94]

In his concurrence, Justice Breyer noted that "watching the video footage of the car chase made a difference to my own view of the case."[95] Thus, it seems that had there been no video footage available or had the Justices chosen to accept the lower courts' factual determination, Justice Breyer's vote would have gone the other way. Given the reactions to the videotape expressed by several of the Justices in oral argument, it is very possible the Court would have affirmed the court of appeals' judgment but for the videotape.

Justice Stevens dissented from "this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals. . . ."[96] He believed that the video "confirm[ed], rather than contradict[ed], the lower courts'" view of the chase's circumstances.[97] But Justice Stevens also thought that it did not matter whether the video confirmed or contradicted the court of appeals because "[o]ur duty to view the evidence in the light most

[90] *Harris III*, 550 U.S. at 378.
[91] *Id.* at 380–81.
[92] *Id.* at 378–79.
[93] *Id.* at 379–80. *But see supra* notes 5, 7–9 for the district court and court of appeals' factual determinations at variance with the Supreme Court's.
[94] *Harris III*, 550 U.S. at 380, 386.
[95] *Id.* at 387 (Breyer, J., concurring).
[96] *Id.* at 389–90 (Stevens, J., dissenting).
[97] *Id.* at 390.

favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment."[98] Justice Stevens wrote that since "two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree" and that it was "certainly possible" that a jury could find that Scott used unreasonable force when seizing Harris.[99] "[E]ight of the jurors on this Court[,]" he concluded, have "usurped the jury's factfinding function[.]"[100]

The question before the Court, whether a police officer has qualified immunity from suit, was therefore complicated because of the presence of a camcorder in the officer's car. If there had been no videotape evidence of the car chase, the appellate courts would only have the district court's description of the chase and the briefs filed by both Scott and Harris upon which to base their decision. The briefs described the same car chase in vastly different ways,[101] which is of course how most appellate briefs seek to persuade the appellate courts. Previously, the court of appeals and the Supreme Court would have had only those factual recitations to rely on when making its decision. As Justice Breyer frankly admitted, his vote would have been different had he not viewed the videotape of the car chase.[102] Therefore, the importance of deciding whether to allow appellate courts access to hot records that previously would have been unavailable cannot be overstated.

IV. FACTFINDING AT THE SUPREME COURT

While the Supreme Court has not previously used such a hot record to determine the outcome of a case, it has acted as the factfinder in other situations. The Court has decided several cases in which facts were presented as either part of the trial record or as facts of which the Court could take judicial notice.[103]

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[98] *Id.* at 394.

[99] *Id.* at 396.

[100] *Harris III*, 550 U.S. at 389, 395.

[101] Petition for Writ of Certiorari, *supra* note 68, at 4–5; Brief for the Respondent, *supra* note 68, at 4–5.

[102] *Harris III*, 550 U.S. at 387 (Breyer, J., concurring).

[103] *See* John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J.

Scholars have suggested that the Court should accept facts only after "their accuracy is carefully checked, and the witnesses presenting them subjected to cross examination."[104]

A. Constitutional Factfinding

The Supreme Court has previously held that it must view evidence from the lower courts' records in obscenity cases.[105] In *Jacobellis v. Ohio*,[106] Justice Brennan wrote that "in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."[107] The Court viewed the film at issue in *Jacobellis* to determine whether its contents were protected by the First Amendment. Justice Brennan reasoned that such a task was necessary to "our duty to uphold the constitutional guarantees" because the "question whether a particular work is obscene necessarily implicates an issue of constitutional law."[108] Such implications "must ultimately be decided by this Court" because treating such questions as factual ones that can be determined by juries is inappropriate.[109] The Court could not merely exercise a "limited review" in cases with constitutional implications.[110] Therefore, in cases where the evidence implicates constitutional issues the Court has the duty to review each piece of evidence prior to making a ruling.

However, in *Miller v. California*, the Court established a test for the trier of fact to determine obscenity.[111] Having spent nearly a decade deciding obscenity cases resulting in "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication[,]"[112] the Court was ready to

TRIAL ADVOC. 1, 13, 31–32 (1993); *infra* Part IV.A-B.

[104] *The Consideration of Facts in "Due Process" Cases*, 30 COLUM. L. REV. 360, 367 (1930).

[105] Jacobellis v. Ohio, 378 U.S. 184, 187–89 (1964). The Court found that obscenity is not speech protected by the First Amendment in Roth v. United States, 354 U.S. 476, 485 (1957). Therefore, determining whether speech is obscene is critical to determining if it should be constitutionally protected.

[106] *Jacobellis*, 378 U.S. at 184.

[107] *Id.* at 190.

[108] *Id.* at 188.

[109] *Id.*

[110] *Id.* at 187.

[111] Miller v. California, 413 U.S. 15, 24 (1973).

[112] *Id.* at 22 (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704–05

adopt a definition of obscenity that could be usefully applied by triers of fact, whether juries or judges. The test for obscenity is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest[;] . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[113]

The first two prongs of the test are measured by the local standards of the average person while the third prong is measured by a national standard.[114] The teaching of *Miller* is that constitutional factfinding can be done by juries and lower court judges if the Supreme Court has given clear guidance on to how to proceed. No longer do citizens have to wait for five Justices to use "obscure standards" to pronounce something obscene.[115] Lower courts can make that determination by applying the *Miller* test.

While the videotape in *Harris III* did not implicate constitutional questions, it did ignore the teaching of *Miller*. The videotape itself was not the reason that Scott was being sued, unlike Jacobellis, whose criminal record was based on his possessing and exhibiting a movie reel deemed obscene by Ohio, or Miller, who distributed obscene materials in violation of a California statue.[116] The videotape was evidence of Scott's actions, which resulted in Harris' injuries. Such evidence would not have existed five or ten years ago,[117] and appellate courts would only have had the trial record upon which to base their conclusions. Whether Scott or Harris' version of events was more believable would have been decided by the jury, which may or

(1968) (Harlan, J., concurring and dissenting)).

113 *Id.* at 24 (citations omitted).

114 *See id.* at 30–31; *see also* Smith v. United States, 431 U.S. 291, 301 (1977).

115 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973).

116 *Miller*, 413 U.S. at 16–17; *Jacobellis,* 378 U.S. at 185.

117 The reasons generally offered to put in car video surveillance equipment are to protect the officer from lawsuits, as well as to discourage misconduct on the part of the police officers. *Oakland Cops may go to Video; City Wants Cameras in Squads*, S. F. CHRON., Feb. 3, 2004, *available at* http://www.policeone.com/police-products/vehicle-equipment/in-car-video/articles/78478-Oakland-cops-may-go-to-video-City-wants-cameras-in-squads/. On the other hand, some videos have served to indict officers because of their conduct. *Video Triggers FBI Probe of L.A. Arrest*, MSNBC, Nov. 10, 2006, http://www.msnbc.msn.com/id/15649790/ (discussing the phenomenon of clips of arrests being posted on YouTube and causing outrage among the community).

may not have had access to the videotape. Thus, this was not one of those instances where the Court needed to do any factfinding to decide the case.

In deciding *Scott*, the Court moved away from allowing Scott and Harris' community to judge the standard to which they wished to hold their police officers. The Court did not offer clear guidance to lower courts on how to analyze video footage. In rejecting the *Miller* approach, the Court returns to the days of "know[ing] it when [they] see it."[118]

B. Factfinding from the Record

In *Wisconsin v. Yoder*[119] the Court had to determine whether Wisconsin's compulsory school attendance statute violated the First Amendment rights of Amish parents.[120] To determine whether the statute, as applied, violated the Amish's First Amendment rights, the Court had to understand and analyze the Amish way of life.[121] The Court was able to rely on the record created by the lower courts because both the prosecution and defense had presented facts on the issue of Amish religious views and behavior.[122] Indeed, many of the facts were stipulated by both parties and Professor John Jackson argues that it was this process that led to Wisconsin's defeat at the appellate level.[123]

Because the prosecution chose only to present or stipulate facts that demonstrated the Amish had violated Wisconsin's statute, they were unable "to counter the constitutional arguments" made by counsel for the Yoders.[124] Wisconsin did not include any "evidence of compelling state interests that would outweigh" the Yoders' liberty interests in educating their children as their religious beliefs dictated.[125] The defense, on the other hand, presented witnesses who made persuasive arguments that the Amish faith prevented them from sending their children to school

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[118] *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring). The need for "community standards" regarding police conduct will only be enhanced by the additional presence of cameras, whether wielded by the police officers themselves as a defensive tactic to prevent frivolous lawsuits or by ordinary citizens as an offensive tactic to prevent abuse at the hands of rogue officers.

[119] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[120] *Id.* at 207–09.

[121] Jackson, *supra* note 103, at 20.

[122] *Id.* at 20–21; *see also Yoder*, 406 U.S. at 219.

[123] Jackson, *supra* note 103, at 20–22.

[124] *Id.* at 21.

[125] *Id.* at 22.

past a certain age and thus the compulsory attendance statute was unconstitutional as applied to them.[126] Professor Jackson argues that because the Amish adduced facts favorable to their constitutional arguments at trial—where they were tested by the adversarial process—and because Wisconsin did not introduce any facts on their constitutional position into the trial record, Wisconsin lost because the Supreme Court could "easily conclude[]" that the First Amendment prohibited the application of Wisconsin's statute to the Yoders.[127]

In *Harris I*, the trial record could not be created because the case was before the district court on a motion for summary judgment. Yet, had the video been "tested" by the adversarial process with Harris, Scott, and the other officers testifying in court as the district court first ordered, a record would have been created. Such a record would have made it harder for the Justices to base their decision solely on the videotape. Therefore, before a hot record is put before an appellate court, it seems preferable to test it with the adversarial process.

C. Factfinding from a Brandeis-type Brief

Instead of the techniques used in *Yoder*—of putting the information in the record—an alternative option is to present the evidence in a Brandeis-type brief. The Brandeis Brief is named for the brief for the defendant in error, Oregon, filed by Louis D. Brandeis and Josephine Goldmark to the Supreme Court in *Muller v. Oregon*.[128] In the brief, Brandeis and Goldmark presented statistical studies, public health reports, and state and international surveys for the Court's adjudicative notice.[129] This was the first time a certiorari petition or brief made use of such

126 *Id.* at 21–22; *see also Yoder*, 406 U.S. at 209–12.

127 Jackson, *supra* note 103, at 21–22 (citations omitted).

128 Muller v. Oregon, 208 U.S. 412, 419 (1908); Clyde Spillenger, *Revenge of the Triple Negative: A Note on the Brandeis Brief in* Muller v. Oregon, 22 CONST. COMMENT. 5, 5 (2005).

129 Brief for Defendant in Error, *Muller*, 208 U.S. 412 (No. 107), *available at* http://library.louisville.edu/law/brandeis/muller.html; *see also* Spillenger, *supra* note 128, at 6. "Adjudicative facts are case specific[,]" such as the words and actions of the parties that give rise to lawsuit. Jackson, *supra* note 103, at 1. They serve as the "basis and the controlling force behind the application of existing law[.]" *Id.* at 2. Professor Kenneth Davis first coined the phrase adjudicative facts and defined them as "facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent[.]" FED. R. EVID. 201 Advisory Committee's Notes, subdivision (a).

information.[130] Thereafter, any appellate briefs which made use of economic and social surveys, scientific discussions, or any other such legislative evidence became known as Brandeis-type briefs.[131]

Some scholars have questioned the validity of the surveys in the Brandeis brief.[132] They argue that the brief presented "highly selective" studies to prove the merits of its argument.[133] Other scholars question whether the presentation of such evidence should be done through a Brandeis-type brief instead of the trial court.[134] They argue that the trial court is the proper forum for the presentation of such facts because a Brandeis-type brief does not allow the evidence to be tested by trial.[135] They believe that when both sides present sufficient evidence of those facts at trial, the decisions would be better informed and the record more complete.[136] Trial courts are the better forum because "facts are tested most effectively in the trial arena through the tools of observation and cross-examination."[137] Throughout the trial process the accuracy of such facts can be analyzed, as well as the competency of the person offering the facts.[138] By establishing the record before the case is appealed, factfinding is "more controlled, and judges will be less inclined to search for evidence without the aid or input of the parties."[139] The need for a Brandeis-type brief is then rendered moot.

Federal Rule of Evidence 201 governs judicial notice of adjudicative facts such as those found in the Brandeis brief. The usual method to establish adjudicative facts is through evidence in a particular case.[140] Rule 201(b) makes clear, however, that judicially noticed facts must not be "subject to reasonable dispute."[141] The Advisory Committee Notes go further, requiring

130 *See* Spillenger, *supra* note 128, at 5–6.

131 Jackson, *supra* note 103, at 2 (citations omitted); BLACK'S LAW DICTIONARY, *supra* note 5, at 188.

132 Spillenger, *supra* note 128, at 5–6.

133 *Id.* at 6.

134 Jackson, *supra* note 103, at 3.

135 *Id.; see also* Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 14 (1924).

136 Jackson, *supra* note 103, at 4.

137 *Id.* at 5.

138 *Id.*

139 *Id.* at 3.

140 FED. R. EVID. 201 Advisory Committee's Notes, subdivision (a).

141 *Id.* § 201(b).

a "high degree of indisputability" as "the essential prerequisite" to judicial notice.[142] The video in *Harris I* would seem an unlikely candidate to be an adjudicative fact because it is subject to dispute.

The Federal Rules of Evidence regulate which types of facts reach juries, which generally require judges to determine "preliminary facts in order to resolve evidentiary issues."[143] Appellate judges usually defer to trial judges' determinations of preliminary facts because most preliminary facts rely on the testimony of witnesses who, hitherto, only the trial court has been able to see.[144] Appellate judges previously had to rely on the transcript of the testimony and therefore concluded that trial judges were better able to assess the credibility, sincerity, and relevancy of the testimony.[145] Yet it is possible that videotapes of witness' testimony could render these rules null because appellate judges will now be able to see the witness "live" just as the trial judge has.

A party's waiting until the appeals process to introduce facts means the appellate court will have to rely on an "inadequate" trial court record.[146] Without such a record the appellate judge could search independently for information or, worse, make assumptions in the absence of proof.[147] Without creating the record in the trial court, the lawyer runs the risk of the appellate judge's not having a foundation upon which to find in the attorney's favor.[148]

Further, the appellate judge, while trained to answer questions of law, is not necessarily in the appropriate position to handle questions of fact.[149] Appellate judges "should not" attempt to handle questions of fact unless the "relevant facts are properly brought before them either by means of direct evidence or through such presentation as justifies judicial notice" or if constitutional facts are implicated.[150] The trial court, however, is well situated to analyze questions of fact through the trial

142 *Id.* § 201 Advisory Committee's Notes, subdivision (a).

143 David L. Faigman, *Appellate Review of Scientific Evidence Under* Daubert *and* Joiner, 48 HASTINGS L. J. 969, 974 (1997).

144 *Id.* at 975.

145 *Id.*

146 Jackson, *supra* note 103, at 7.

147 Biklé, *supra* note 135, at 21.

148 *Id.*

149 *Id.*

150 *Id.*

process.[151]

An additional problem with an inadequate record from the lower courts is that it forces appellate courts "to remand cases for further findings of fact[s],"[152] dragging out the litigation, and draining the time and resources of the parties involved. More extensive and better factfinding in the trial court allows the appellate judge to make "accurate and just findings[.]"[153] Instead of briefs possibly based on "irrelevant facts[,]" the appellate court would have a complete and adequate record upon which to base its decision.[154] Appellate courts, therefore, would not have to rely on Brandeis-type briefs for the facts.[155]

By creating a trial record that thoroughly analyzes the facts of the case, the trial court has provided a basis for its decision that "is unalterable by future courts."[156] The decision of the trial court has been "legitimize[d]" by the record created during the trial.[157] In such instances, the appellate court would have to find the trial court's decision "clearly erroneous" in order to overturn it.[158] Under the clearly erroneous standard, the appellate judge would have to believe that the trial court's analysis of the evidence presented was indisputably wrong. The appellate court does not have to agree with the decision of the trial court, but it must "acknowledge the facts and deal with them."[159]

The benefit of a complete trial record is that it provides an "adequate and public basis" for the appellate court's decisions.[160] By relying solely on a Brandeis-type brief, there is a risk that the appellate court might only recognize "the existence of extra-record material" but not "adopt any of it" in light of the record.[161] However, if the facts are introduced at the trial, the appellate

151 Jackson, *supra* note 103, at 3.
152 *Id.* at 9.
153 *Id.*
154 *Id.* at 10 (citations omitted).
155 *See id.* (citations omitted).
156 *Id.* at 15 (citations omitted).
157 Jackson, *supra* note 103, at 15.
158 *Id.* at 15 n.85.
159 *Id.* at 19.
160 *Id.* at 24.
161 *Id.* at 27. *But see* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 37 (1978) ("The only factual issues concerning the materials brought before the Supreme Court in . . . a [Brandeis-type] brief were whether they in fact existed, a circumstance almost never in dispute, and how far their authors possessed at least some competence, a fact that was rarely controverted.").

court cannot change them.[162] A Brandeis-type brief is unable to achieve the same results because the information arrives at the appellate court after the trial court has created its record.[163]

The original Brandeis brief successfully convinced the Supreme Court that it should restrict the hours of work for women.[164] Although the Court did not find the data Brandeis included in his brief to be "authorities" on the subject, it was deemed "significant."[165] The Supreme Court held that it would "take judicial cognizance of all matters of general knowledge."[166] However, the Court found similar data "interesting but only mildly persuasive" in a later case.[167] Yet Brandeis-type briefs have been successfully used in many cases.

For example, in *Brown v. Board of Education*[168] the Supreme Court based its decision on legislative and sociological data provided in Brandeis-type briefs.[169] While Kansas did try to convince the Court that the data presented by the appellants' briefs was "overstated," it did not present legislative evidence on its own behalf.[170] Professor John Jackson argues that this was likely due to "an underestimation of the importance of the trial record" as it was likely Kansas would have been able to find experts to testify that segregation was beneficial, or at least not harmful, in the early 1950s.[171] In fact, some scholars have commented on the limited research in which the data in the *Brown* briefs were based.[172]

Jackson further argues that the trial record "not only supplied supportive evidence for the moral position, but mandated the ruling in *Brown*. . .."[173] Because there was no evidence of the

162 Jackson, *supra* note 103, at 40.

163 *Id.* at 41.

164 *See Muller*, 208 U.S. at 420–21.

165 *Id.* at 420.

166 *Id.* at 421. Such judicial cognizance has led to a greater increase in the amount of *amici curiae* briefs filed with the Court. Such a change was noted not long after Brandeis' brief was filed: "[b]y the October, 1948 term amici briefs had become a genuine problem for the justices and their clerks." Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953).

167 Adkins v. Children's Hosp., 261 U.S. 525, 560 (1923).

168 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

169 *Id.* at 493–94.

170 Jackson, *supra* note 103, at 32 & n.189.

171 *Id.* at 32 n.189.

172 Nancy Bellhouse May, *Foreword* to Symposium, *Fifty Years Later: Brown in the Appellate Courts,* 6 J. APP. PRAC. & PROCESS 11, 11 (2004).

173 Jackson, *supra* note 103, at 33.

harmful effects of segregation at the time of *Plessy v. Ferguson*,[174] Justice Harlan had no evidence upon which to base his dissent, and thus was accused of basing his legal argument on an "assumption."[175] The lack of evidence also meant that the majority in *Plessy* was also operating under an assumption of its own.[176] By the time *Brown* was decided, there was enough evidence that the theory of separate but equal was no longer "viable constitutionally."[177]

In more recent times, Brandeis-type briefs used in *Grutter v. Bollinger* were extremely persuasive to the Court. [178] Although *Grutter* involved the constitutionality of Michigan Law School's admissions policies, the implicit question was whether a diverse student body provided any educational benefits to law students.[179] The Court first cited the conclusions of the district court that race-conscious admissions policies were beneficial to students.[180] Then the Court moved on to the *amici* briefs, particularly the brief filed on behalf of retired military officers.[181] The military officers' assertion that racial diversity was necessary for the proper functioning of the nation's military and that race-conscious recruiting and admissions policies were needed to further the goal of diversity greatly impressed the Court, who cited to the brief five times and directly quoted the brief's language several times.[182] Although the number of briefs filed in *Grutter* was high and the impact the briefs had on the Justices is clear, it is also important to note that the majority referenced the district court's findings before moving on to the information provided in Brandeis-type briefs.[183]

Although Brandeis-type briefs have worked in the past, it is far

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[174] *See generally* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (stating that the problem with the plaintiff's case is the assumption of harmful effects resulting from segregation).

[175] Jackson, *supra* note 103, at 34; *see also Plessy*, 163 U.S. at 551.

[176] Jackson, *supra* note 103, at 34.

[177] *Id.* at 35.

[178] *See* Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (citing to information contained within the *amicus curiae* briefs filed with the court).

[179] *See id.* at 327–29.

[180] *Id.* at 330.

[181] *Id.* at 330–31.

[182] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1544 (2008).

[183] *See generally Grutter,* 539 U.S. at 321, 330–31 (making no mention of *amicus curiae* briefs until after discussing the district court's opinion).

preferable for the facts to be tested by the trial court and found in the record. Appellate courts cannot dismiss the record as easily as they can a Brandeis-type brief. As we have seen in *Scott*, it is also easier for attorneys to slant facts in the briefs. Such persuasive writing is a lawyer's bread and butter, but does not ensure that the appellate court receives a clear-eyed view of the facts. A proper trial record, on the other hand, does allow the appellate court to rely on facts that have been thoroughly tested by the adversarial process. One of the deficits of the litigation in *Scott v. Harris* was the lack of any adversarial testing of the video until the oral argument at the Supreme Court.

D. Factfinding with Scientific Evidence

General Electric Co. v. Joiner[184] discussed the issue of admitting scientific evidence and expert testimony on scientific principles, and is particularly relevant since the case was also on appeal from summary judgment.[185] Joiner claimed that there were factual issues in dispute that should properly be heard by a jury, but the trial judge, after hearing from the experts, granted summary judgment.[186] The Eleventh Circuit reversed, believing that it should conduct a stringent review of the exclusion of expert testimony by the trial judge.[187] The Supreme Court held that admissibility of expert testimony is not an issue of fact and therefore is reviewed under the abuse of discretion standard.[188] The Court then applied this standard to the record and found that the district court did not abuse its discretion in excluding the expert testimony.[189]

Justice Stevens dissented in part because he felt the Court had gone beyond the question on which certiorari was granted by analyzing whether the trial court properly held the expert testimony inadmissible.[190] Justice Stevens' dissent, a precursor to his dissent in *Scott*, stated his belief that the court of appeals was better situated to answer that question than the Supreme

184 Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).
185 *Id.* at 140–43.
186 *Id.* at 140.
187 *Id.*
188 *Id.* at 146.
189 *Id.* at 139.
190 *Gen. Elec. Co.*, 522 U.S. at 150 (Stevens, J., concurring in part and dissenting in part).

Court.[191] The court of appeals should conduct the review of the record under the standard outlined by the Court (with which Justice Stevens concurred).[192] As in *Harris III*, Justice Stevens thought that the Justices were substituting their opinions instead of showing the proper deference to the lower courts.[193]

Scientific evidence presents special problems because it can be both case-specific and recurring.[194] Evidence presented to the trial court on specific scientific issues is often based on the testimony of experts. Professor David Faigman suggests a standard to guide appellate review of scientific evidence.[195] Expert testimony regarding scientific evidence which "transcends the particular case" should be reviewed *de novo* because the scientific principles are likely to recur and can often involve policy issues.[196] Case-specific scientific evidence should be reviewed deferentially because the trial court is best positioned to assess the credibility of the witnesses.[197] This framework is based on the assumption that trial courts are better situated to make credibility assessments because only they can watch the witnesses testify. Would the framework change if appellate courts were able to view the testimony "live" via video-recording?

V. RESULTS OF THE COURT'S DECISION IN *SCOTT V. HARRIS*

By making the videotape available on its website, the Court effectively has invited the public to view the videotape and make our own determinations.[198] The public, in effect, has become the jury, able to weigh the videotaped evidence and determine whether the car chase was excessive or not. This negates Justice Scalia's view that the video "speak[s] for itself."[199] By preserving

191 *Id.* at 150–51.

192 *See id.* at 150.

193 *See id.* at 151 (addressing how the court does not adequately establish its holding); *Harris III*, 550 U.S. at 396 (Stevens, J., dissenting) (observing how judges as well as jurors could reasonably disagree).

194 *See* Faigman, *supra* note 143, at 979.

195 *Id.* at 976.

196 *Id.* at 976–77.

197 *Id.* at 976, 979.

198 *See Harris III*, 550 U.S. at 378 n.5. The video is grainy, black and white, with unintelligible background noise and comprises the edits of three different police cameras. *See* Videotape, *supra* note 2.

199 *Harris III*, 550 U.S. at 378 n.5. Justice Stevens' dissent would have also indicated to the rest of the Justices that watching the video did not end any controversy over the chase. While seeing may be believing for some, the use of video evidence may "contribute . . . to the formulation of questionable legal

the video in a manner that, according to a Supreme Court official, should last as long as the United States Reports exists,[200] generations will be able to watch Harris evade Scott and debate whether Scott's ramming of Harris' car involved excessive force. The question, although judicially determined,[201] will never be settled.

Appellate deference to trial courts has been said to promote "finality" in the search for decisional correctness.[202] Professor Carl R. Moy has argued that placing more information before an appellate court could cause such deference to lessen, and this has proven true in the *Harris III* decision.[203] The Supreme Court took Harris' case, which was wending its way to trial, and brought it to a halt based on the Justices' viewing of the contents of a police videotape.

However, Francis X. Gindhart, former clerk of the Court of the Federal Circuit, believes that technology will free appellate courts from "deference that inappropriately arises solely from the practical inability to perform review on the record. . . ."[204] Gindhart argues that "[a]ctual witness testimony brings alive a cold and possibly ambiguous . . . paper transcript" which "will, if anything, reinforce the already well-established recognition by appellate courts that trial judges and juries get credibility right."[205] However, while technology might make it easier for appellate courts to sort through the record, "permit[ting] the

arguments and conclusions." Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1707 (1997). While discussing mostly maps and photographs used in Supreme Court opinions, Dellinger provides a useful analysis in arguing that such evidence should not be used by the Court because "an attachment's probative value can be outweighed by its prejudicial effect[]" and can "'open the gates of emotion.'" *Id.* at 1708 (citations omitted).

200 Interview with Frank D. Wagner, Reporter of Decisions, in Washington, D.C. (Aug. 23, 2007) (on file with the author).

201 On remand, the Court of Appeals reversed the denial of Scott's motion for summary judgment and remanded to the district court for further proceedings in accordance with the Supreme Court's decision. Harris v. Coweta County, 489 F.3d 1207 (11th Cir. 2007). On remand, the United States District Court for the Northern District of Georgia entered summary judgment in favor of Scott. Harris v. Coweta County, 261 F. App'x 213, 214. Harris appealed and the Court of Appeals held that he was statutorily barred from recovering for his injuries. *Id.* at 215.

202 Francis X. Gindhart & Carl R. Moy, *High-Tech Appeals: Can Hypertext Briefs Aid Justice Without Changing the System?*, 83 A.B.A. J. 78, 79 (1997).

203 *Id.*

204 *Id.* at 78.

205 *Id.*

appellate court to watch the key testimony at trial by video imaging[]" does not appear to reinforce appellate courts' belief that the lower courts *got it right*.[206] And while bringing *alive* a cold record might make a case more interesting for appellate judges and their clerks, it appears only to cause further confusion for judges.

A. Problems with the Materials Generated

An additional problem is the amount of materials generated by new technology. The Supreme Court had to change its rules for accepting lodgings after being "deluged" with "stacks of paper, reports, photographs, videos, and DVDs. . . ."[207] Although this rule applies to lodgings and not the record itself, it is clear that technology, far from creating a paperless record, in fact generates boxes of material that must be sorted through and stored somewhere. Additionally, providing access to such information is difficult since the only authentic version of Supreme Court opinions is the United States Reports.[208] Adding maps or photographs to illustrate an opinion, as is often done in electoral or boundary disputes,[209] is not too problematic.[210] Providing permanent access to multimedia documents could provide a

[206] *Id.*

[207] Tony Mauro, *Correcting the Record*, LEGAL TIMES, Feb. 10, 2003, at 12; *see* SUP. CT. R. 32(3). Recently, the lawyers for those opposing Exxon Shipping Company's petition for writ of certiorari on the amount of damages owed for the *Exxon Valdez* oil spill in Alaska filed a DVD with the Court to remind the Justices "of 'the community and social outrage' at the time of the spill" because nearly twenty years have passed since the disaster. The attorney, Jeffrey Fisher, was "emboldened to file the DVD with the Court because of the importance the justices attached to the car chase video in the case of Scott v. Harris." Tony Mauro, *Exxon Spill Award Hits High Court*, LEGAL TIMES, Feb. 11, 2008.

[208] *See* Association of Reporters of Judicial Decisions, *Statement of Principles: "Official" On-line Documents* (last revised May 2008), *available at* http://arjd.washlaw.edu/ARJD_Statement%20of%20Principles_May2008.pdf.

[209] *See* Van Orden v. Perry, 545 U.S. 677, 706 (2005) (App. A to Opinion of Breyer, J.) (showing photographs of the statue of the Ten Commandments on Texas State Capitol grounds); Alaska v. United States, 545 U.S. 75, 112 (2005) (App. A to Opinion of Kennedy, J.) (showing a graphic of Alaska's historic inland waters); United States v. United Foods, Inc., 533 U.S. 405, 431 (2001) (App. to Opinion of Breyer, J.) (showing mushroom recipes); Vieth v. Jubelirer, 541 U.S. 267, 342 (2004) (App. to Opinion of Stevens, J.) (showing a map of congressional districts).

[210] Although there are problems with the fact that some private publishers provide different versions of the maps and photographs than those found in the U.S. Reports. *See* Dellinger, *supra* note 199, at 1713 n.58.

hardship.[211]

Such lodgings have been useful to Justices in the past, however. Tony Mauro discusses the lodgings in *Eldred v. Ashcroft*,[212] in which the Motion Picture Association of America ("MPAA") lodged restored and enhanced DVDs of Casablanca and Citizen Kane with the Court.[213] The MPAA argued that extending copyright for older works gives studios the incentive to preserve and reissue movies that might otherwise fade out of existence.[214] Justice Stevens, in his dissent, agreed with the MPAA's arguments and used the DVDs as evidence of the "significant creative work" that went into restoring and reissuing these classics.[215] Viewing the DVDs to determine whether the enhancements were worthy of copyright is subjective, as it is with viewing the videotape of the car chase in *Harris III*. But such "evidence" was not used by the justices to verify a factual assertion key to the determination of the case.[216]

B. Evolution of Federal Rules

There are few rules that specifically address the issue of technological changes in the availability of evidence. Recent amendments to the Federal Rules of Civil Procedure that went into force December 1, 2006, have expanded the definitions of many Rules to include modern technology and to ease the use of such evidence. For example, the Advisory Committee Notes to Rule 30(b) note that previously a court had to agree to "nonstenographic means" of recording testimony whereas now testimony can be recorded by "sound, sound-and-visual, or

[211] The Library of Congress, for example, has implemented a digital preservation project to ensure access in the future to digital media at great cost to the taxpayer. More information on the project can be found at the National Digital Information Infrastructure and Preservation Program, http://www.digitalpreservation.gov/library (last visited Apr. 13, 2009). There is an "internet archive," available for free and run by a nonprofit, that has been collecting and preserving digital media since 1996 and includes a "way back" machine that purports to allow users to see web pages that have been removed from their servers. *See* Internet Archive: Wayback Machine, http://www.archive.org/web/web.php (last visited Apr. 13, 2009).

[212] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[213] *Id.* at 240 n.13.

[214] *Correcting the Record*, *supra* note 207, at 12.

[215] *Eldred*, 537 U.S. at 240 n.13.

[216] *See generally id.* (observing that the justices do not rely on what is in the content of the DVDs at any point in the majority opinion).

stenographic" methods without prior permission.[217] However, if a party avails itself of "nonstenographic" means, a transcript must be provided to the court.[218] Rule 30 also further requires that the "appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques."[219] All recordings must be protected against "loss, destruction, tampering, or deterioration."[220]

Article IX of the Federal Rules of Evidence discusses the evidence-authentication requirement. Rule 901(a) requires that evidence be authenticated "as a condition precedent to admissibility."[221] The Advisory Committee's Note makes clear that "the need for suitable methods of proof still remains[] since . . . cases of genuine controversy will still occur."[222] However, Rule 902 allows that such extrinsic evidence of authenticity is not required in certain situations. For example, under Rule 902(1), documents bearing the seal of the United States or a department thereof, and under Rule 902(4), certified copies of public records are considered self-authenticating.[223] This Rule would likely allow police videos to be self-authenticating.

Federal Rule of Evidence 1002 also requires that the original recording prove its contents.[224] The video in evidence in Harris' car chase is actually a compilation of several videos taken from various officers' cars.[225] Rule 1005 appears to allow "data compilations" to be admissible to prove the contents of a compilation of public records.[226] However, the issue in *Harris III*

217 FED. R. CIV. P. 30(b)(2) Advisory Committee's Notes, subdivision (b).

218 *Id.* § 32(c).

219 *Id.* § 30(b)(4).

220 *Id.* § 30(f)(1).

221 FED. R. EVID. 901(a).

222 *Id.* § 901(a) advisory committee's note.

223 *See e.g.*, FED. R. EVID. 902(1), 901(4) (stating under Rule 902, titled "Self-Authentication," that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . (1) Domestic public documents under seal . . . . [and (2)] Certified copies of public records.").

224 *Id.* § 1002 ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.").

225 Although there is no concern that the video was edited for nefarious purposes, the fact that it was edited brings to mind Justice Scalia's reasons for refusing video recording of Supreme Court oral arguments: that networks will only show "15-second takeouts . . . that . . . will misinform the public rather than inform the public . . . ." Andrew Brenner, *Courtrooms Shuttered to Cameras in Three Trials,* 29 NEWS MEDIA & L. 33 (2005), *available at* http://www.rcfp.org/news/mag/29-2/bct-courtroo.html.

226 FED. R. EVID. 1005.

was not whether the recording was authentic or valid, but the interpretation of the contents of the video. No Rules speak to this issue because interpreting testimony is an issue of fact that would normally be determined by a jury.

C. Use of Scott v. Harris as Precedent

On February 19, 2008, the Supreme Court granted the petition for writ of certiorari, vacated to lower court's judgment, and remanded back to the court of appeals the case of *Robinson v. Lehman* in light of *Scott v. Harris.*[227] Justices Stevens and Ginsburg dissented, stating that they would deny the petition for writ of certiorari.[228] The *Robinson* case, which involved a police car chase in Reno, Nevada, came up from the Court of Appeals for the Ninth Circuit.[229] In this case, the district court and the court of appeals—without mentioning the videotapes of the incident—denied summary judgment to two police officers who shot Joshua Lehman.[230] Because the videotapes are not available to the public, it is impossible to tell what difference the videotapes would make to the determination of this case, although the facts as presented by the police officers are damning enough.

First, the officers were responding to a potential suicide call when they encountered Joshua Lehman sitting in his truck on a side street south of Reno.[231] The caller had attempted to disable Lehman's truck.[232] One officer approached Lehman, who was repairing his truck, and ordered him out of his truck, an order with which he refused to comply.[233] Another officer then sprayed him with pepper spray through his open window, at which point Lehman started the engine.[234] He attempted to leave the scene by backing his truck into the officers' sedan, which was blocking

[227] Robinson v. Lehman, 128 S. Ct. 1219 (2008). As of April 24, 2009, there has been no action on the remanded case by the Court of Appeals for the Ninth Circuit.

[228] *Id.*

[229] Lehman v. Robinson, 228 F. App'x. 697 (2007); Petition for Writ of Certiorari, *supra* note 68, at 4, *Robinson*, 128 S. Ct. 1219 (No. 07-470).

[230] *See generally Lehman*, 228 F. App'x at 698–700 (making no mention of the videotape recordings of the incident).

[231] *See* Petition for Writ of Certiorari, *supra* note 68, at 3, *Robinson*, 128 S. Ct. 1219 (No. 07-470).

[232] *Id.*

[233] *Id.*

[234] *Id.* at 3–4.

his exit, at which point the officers fired twenty-two times at the truck, flattening all the tires, but not disabling the engine.[235] The officers radioed that shots had been fired and requested backup, not explaining why shots were fired or that shots had been fired only by the officers, and pursued Lehman as he made his way down the street, going twenty miles per hour.[236]

In order to prevent Lehman from reaching a major highway at rush hour, Trooper Sean Giurlani received permission to engage in a "PIT" maneuver, which succeeded in stopping the truck; it was soon surrounded by police officers and their cars.[237] At this point, Lehman exited his crippled truck and, with a five-inch knife in hand, approached the officers.[238] He was ordered to drop the knife, which he did not do, and instead returned to his truck.[239] While Giurlani tried to talk Lehman into giving up his knife, two officers deployed tasers via the open window, one of which hit Lehman's truck.[240] Lehman's truck reversed, endangering the officer who was standing behind the truck, at which point Officers Tom Robinson and Robert Tygard fired four shots from their cover rifles which killed Lehman.[241]

Without access to the videotapes from the police officers at the scene it is impossible to tell just how dangerous the situation was. However, the factual summary above was taken from the petition for a writ of certiorari filed by petitioners, Officers Robinson and Tygard. Thus, the officers admit that Lehman, a potentially suicidal young man, was pepper-sprayed, tasered, and sitting in a vehicle that had had its tires and engine shot out, surrounded by police officers, when he was killed. At the time of his death he had committed no crime,[242] unlike Harris who had been speeding. Robinson and Tygard, who had joined the situation already in progress, believed that Lehman had fired at the officers even though there was no evidence of Lehman

235 *Id.* at 4.

236 *Id.*

237 *See* Petition for Writ of Certiorari, *supra* note 68, at 4–7, *Robinson*, 128 S. Ct. 1219 (No. 07-470) ("PIT is an abbreviation for 'Police (sometimes also referred to as 'Precision') Intervention Tactic.'"). *Id.* at 5 n.1.

238 *Id.* at 6.

239 *Id.*

240 *Id.* at 6–7.

241 *Id.* at 7.

242 *Lehman*, 228 F. App'x. at 699. The officers argue that disobeying their orders was criminal behavior. *See* Petition for Writ of Certiorari, *supra* note 68, at 6–7, *Robinson*, 128 S. Ct. 1219 (No. 07-470).

possessing a weapon other than his knife.[243] Both officers also said they shot Lehman to prevent him from endangering the lives of other officers after his truck reversed.[244] Taking these facts in the light most favorable to the nonmovant, Lehman's executor, the district court found enough genuine issues of material fact to deny summary judgment. Both the district court and the court of appeals found it hard to accept that a man in Lehman's position as outlined by the police could be a danger to others and denied summary judgment for qualified immunity for the officers.[245]

By ordering the lower court to review *Robinson* in light of *Scott*, are the Justices requesting that the court review the case under the rule outlined by the majority: "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death[?]"[246] Given the facts in *Robinson,* that rule does not appear to apply. There was no dangerous, high-speed car chase, there were no innocent bystanders, and the motorist at the time of his death was not in flight. So perhaps they should take Justices Ginsburg and Breyer's suggestion that *Harris III* does not articulate a *per se* rule.[247] Or perhaps they are left with Justice Scalia's comment that the court should not rely on the appellant or appellee's version of the facts, but should "view[] the facts in the light depicted by the videotape."[248] Such ambiguity will not allow police officers a clear-cut rule under which to act, and does not bode well for the rate of litigation that the Court will face on this issue. The issue is further muddled by the Court's recent opinion in *Pearson v. Callahan* which held *Harris III* up as an example of a case in which the "the constitutional question is so fact-bound that the decision provides little guidance for future cases."[249]

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[243] Petition for Writ of Certiorari, *supra* note 68, at 7, 9–10, *Robinson*, 128 S. Ct. 1219 (No. 07-470).

[244] *Id.* at 7, 10.

[245] *Lehman,* 228 F. App'x. at 699–700.

[246] *Harris III*, 550 U.S. at 386.

[247] *Id.* at 386, 389 (Ginsburg, J., concurring) (Breyer, J., concurring).

[248] *Id.* at 380–81.

[249] *Pearson*, 555 U.S. at 12.

VI. CONCLUSION

The trial process gives the litigants and factfinders "the opportunity to personally experience testimony and view the demeanor of witnesses."[250] The appellate court cannot "ignore the trial court's findings" or overrule the judge unless the appellate court finds that her "decision was clearly erroneous."[251] How much more likely is it that an appellate judge will overturn a trial court decision as "clearly erroneous" if the appellate court judge can "experience testimony and view the demeanor of witnesses" via a hot record?[252]

There are rules that have traditionally prevented the Court from overstepping its bounds as an appellate court. Here the Court overstepped its appellate role by taking on the responsibilities of a jury, viewing and weighing evidence to determine the guilt or innocence of the party on trial. The Court should have affirmed the court of appeals decision to allow the case to continue to trial, where a proper jury, informed by the standards of their community,[253] could have decided whether Scott's actions were appropriate. A jury would be better situated to watch the video, witness the testimony of the officers and Harris, and evaluate whether the risk to the public from Harris' flight made the use of deadly force reasonable to end the chase. The district court and the court of appeals appropriately decided that a motion for summary judgment was inappropriate given the genuine issues of material fact in dispute that should be decided by a jury. It is clear that when it comes to the summary judgment standard, appellate courts should defer to the trial court on issues of evidence and not make use of the availability of multimedia information when reviewing a trial court's decision.

A further concern was brought up by Justice Breyer in oral argument. He pointed out that because the video was taken by

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250 Jackson, *supra* note 103, at 40.

251 *Id.*

252 *Id.*

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> Whether a specific use of force is excessive or unreasonable turns on factors such as the severity of the crime, whether the suspect poses an immediate violent threat to others, and whether the suspect is resisting or fleeing. You must decide whether the force used in making an arrest was excessive or unreasonable on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances disclosed in this case.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (Civil Cases) 230–31 (2005).

the police, the viewer was put in the shoes of the officer, watching events unfold from the officer's perspective.[254] The viewer is unable to see what Harris saw, or, because there was no trial, hear what Harris had to say about his actions. The Justices took on Scott's perspective by watching the footage taken from his and other officers' cars, and they absorbed that perspective. Thus, the video, which was never tested by the adversarial process in a trial, allowed Scott to tell his story to the Justices while denying Harris the opportunity to do the same.

The danger that such hot records pose becomes immediately clear. Such video evidence cannot provide insight into the fears, thoughts, and motivations of the participants of a lawsuit in the same way that a trial can. Appellate courts should refrain from viewing evidence that provides the perspective of only one party and has not been tested by the adversarial process of a trial. When the appellate court must review such "hot" items as videotape, it should do so under an abuse of discretion standard, as advocated by the Court in *Joiner*. Appellate courts will defer to the trial court when faced with a cold record of transcripts and they should do the same with a hot record comprising multimedia evidence.

[254] *See* Transcript of Oral Argument, *supra* note 72, at 4.