

Use of Video Surveillance In and Near Courtrooms to Reduce Victim and Witness Intimidation

I. Background

In its expose of the Philadelphia criminal justice system last winter, the Inquirer cited commonplace witness and victim intimidation as one of the causes for Philadelphia's low conviction rate, which is far below the national average for major felonies. Few police, prosecutors or court personnel would disagree that intimidation is a serious problem. Though most witnesses and victims may wish to cooperate with the police and prosecutors, many are simply too afraid to do so for fear of retaliation against themselves or their family. The result is a perpetuation of violence by criminals who recognize that their case is likely to be dismissed if key witnesses are unwilling to testify against them. Likewise, when victims and witnesses are discouraged from providing truthful testimony, the integrity of the entire criminal justice system is undermined.

Though intimidation can take place anywhere and a defendant who is determined to dissuade a victim or witness will seek him or her out, often intimidation is a crime of opportunity precipitated by the victim or witness coming into close proximity of the accused or allies. That opportunity is nowhere more likely than when the parties are at the courthouse during scheduled court appearances. Even if not subjected to actual threatening conduct, victims and witnesses often feel vulnerable to potential violence simply by having to appear in court at the same time as the defendant. Often, the uncertainty is sufficient to cause them to fail to appear.¹

Though today courthouses across the commonwealth are more secure than ever, most often "courthouse security" centers around the use of metal detectors and x-ray scanning of visitors and their possessions before entering the building. While these devices make it more difficult to bring a weapon to court, they have no effect on the ability to use threatening conduct against a victim or witness especially a subtle look or gesture that sends a not-so-subtle message. Many courthouses use perimeter video surveillance and some employ the technology to expand the ability of security personnel to monitor activity the halls. According to the Administrative Office of Pennsylvania Courts, however, none use video cameras to observe or record what takes place at the entrances of and inside individual courtrooms. Yet, prosecutors and trial judges will attest that intimidating conduct often occurs in the courtroom itself, either while defendants and witnesses are waiting for the case to be called or in some instances while the witness is actually

¹ Pennsylvania Commission on Crime and Delinquency, Forum on Witness Reluctance, Report to the Commission December 11, 2007

on the stand testifying.² Often when it happens, only the witness is aware of it and prosecutors and the court therefore may be powerless to take action.

It is important to establish policies and implement all reasonable procedures to provide victims and witnesses with assurances of their safety and the confidence to appear and testify free from threats. Though it is critical that surveillance video not become a *de facto* secondary “record” of judicial proceeding, carefully placed cameras in courtrooms and their environs could discourage intimidation and provide strong evidence for use in a later prosecution without also documenting what transpires at the bar of the court.

II. Video Surveillance Technology

Video surveillance technology that is available today spans a wide spectrum of sophistication and cost. An in-depth overview of current video surveillance technology is beyond the scope of this proposal. Nonetheless, a general description of the types of equipment and alternative strategies which are available is helpful to put the policy and legal issues of a courtroom system in context.

A basic video surveillance system consists of a digital video camera linked to a display that is remotely monitored. The link can incorporate a data storage system to capture and preserve the video for future use. Digital video recorders (DVR’s) have the capacity to store a large amount of data on hard drives, either as streaming video or just a few frames per second. Lower capture rates expand storage capacity exponentially, but produce a lower quality of pictures and fluidity of motions. A full motion system available today, however, can store as much as thirty days of activity at nearly negligible cost.

A system can be either stand-alone for an individual site (e.g., in a single courtroom) or networked from multiple cameras in several sites to a central recording/monitoring location. Use of simple networking technology today allows for multiple video feeds to be recorded simultaneously. Today’s camera technology permits high quality video capture in low light, even no-light conditions. However, because all activity would be recorded in a courtroom environment, with confined, well lit spaces, even lower end cameras would provide adequate detail and a record of any incident.

DVR’s can be basic or sophisticated, simply recording video supplied by the camera or linked to computer servers which provide software and hardware driven features including facial recognition and “video analytics” capable of alerting authorities of movements which may be suspicious given the context of other background activity.

A judicial district wishing to use video cameras would incur a relatively modest initial capital investment but most systems operate without a great deal of cost for maintenance. For example,

² See: Free to Tell the Truth –Preventing and Combating Intimidation in Court: A Benchbook for Pennsylvania Judges (Pennsylvania Commission on Crime and Delinquency, 2011)

a court security specialist for the State of Colorado (which uses cameras in courtrooms) estimates that a \$10,000 investment would pay for a “Cadillac system” installed in four courtrooms.

III. Legal Considerations

A. Pa. R. Crim.P 112

Apparently, one of the reasons security cameras are not used in any Commonwealth courtrooms is a belief that they would be prohibited by Rule 112 of the Pennsylvania Rules of Criminal Procedure. That belief, however, may be misplaced.

Rule 112 prohibits any video recording of judicial proceedings in the courtroom and its environs. Specifically, the rule provides:

112. Publicity, Broadcasting and Recording of Proceedings.

(A) The court or issuing authority shall:

(1) prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and

(2) prohibit the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

The “environs” of the hearing room or courtroom is defined as the area immediately surrounding the entrances and exits.

Certainly, Rule 112 could be read to preclude video surveillance from being employed in and around courtrooms. The comments to the rule provide exceptions only for communication technology used as part of the proceedings and recording to preserve testimony under Rules 500 and 501. There is no explicit exception for courtroom security cameras and recording.

However, read as a whole, the central purpose of the rule appears to be to keep recordings and live broadcasts of judicial proceedings from entering the public domain and/or to ensure that recordings do not become a *de facto* secondary “record”, used to raise legal challenges to the official transcript of the proceedings. It is unlikely that the purpose and scope of the rule was intended to be so broad as to prohibit video recording, under tightly controlled policies and conditions, to enhance the court’s own security and that of the litigants, jurors, witnesses and the public.

Nevertheless, to alleviate any question about the scope of the rule, the Supreme Court could either provide a formal clarifying comment to the rule, or perhaps issue a directive to the courts through the Administrative Office of the Pennsylvania Courts. To be certain that the line between court security and activity prohibited by the rule is not crossed, the court should mandate that specific written policies be established by a judicial district planning to implement a system. To further isolate the security function from the reach of the rule, policies should require that cameras be trained only on the public gallery and the area around the entrance to the courtroom and not on activity at the bar of the court.

B. Wiretap and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701, et seq.

With certain limited exceptions not relevant here, Pennsylvania's Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. § 5701, et seq., prohibits the use of an electronic device to intercept (which includes the recording of) oral communications, under circumstances where the person recorded would have a reasonable expectation of privacy. Written policies should explicitly preclude any audio recording. Though the posting of warnings that audio is being recorded might overcome the WESC's proscription, incorporating sound in a video recording system would not enhance security. Among other reasons, multiple conversations would likely be picked up near the entrance and the voices of litigants and the court would dominate inside.

C. Pennsylvania Right to Know Act (Act 3 of 2008)

As noted, Pennsylvania Rule of Criminal Procedure 112 prohibits video recordings of judicial proceedings, presumably to ensure the depictions do not enter the general public domain. On the other hand, sections 301 and 302 of the Right to Know Act (RTK) requires state and local governmental agencies to produce, on request, every public record maintained by it, or on its behalf by a third party. Since the definition of a "record" includes video recordings of an agency's activities, if surveillance recordings are deemed to be "public records" of a state or local agency, the RTK might require what Rule 112 explicitly prohibits.

Several provisions of the RTK, however, would appear to insulate video surveillance footage from mandatory public disclosure.

Section 304 of the RTK provides that judicial agencies, defined in Section 102 as the courts and administrative offices of the unified judiciary, are required only to produce financial records. Thus, if a video recording is a record of the court's activities, Section 304 would protect it from disclosure.

Security for court operations, however, is generally the responsibility of the office of the sheriff, and the sheriff would presumably be the appropriate agency to have possession and control of the equipment rather than the courts. Unlike the limited disclosure required by judicial agencies, Section 302 requires local agencies such as the sheriff to produce all "public records" which

Section 102 defines as one that is not exempt under Section 708 of the act, is not exempt under federal or state law, regulation, judicial order or decree, or otherwise is privileged.

Though the sheriff may have physical possession and control of the video devices and recordings, the depictions themselves would nevertheless appear to be the record of the court's activity (and therefore protected) under the terms of Section 506 (d), which provides:

Agency possession. —

- (1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act

Though this provision was no doubt meant to prevent a public agency from shielding its records from scrutiny by contracting out some of its functions to a private concern, the plain language would appear also to define which agency's records are generated when a service is provided by contract between two public agencies. Because the surveillance video directly relates to the governmental function of the court (its own security and that of the litigant and public during judicial proceedings), an agreement between the courts and the sheriffs for the latter to operate the equipment would likely establish the recordings as a judicial record, and therefore not required to be disclosed.

Even if they are viewed as the records of the sheriff, Section 708 exempts production of records which, *inter alia*, are exempt from production under "judicial order or decree". Though PA R. Crim. P 112 is not specifically designed to create an RTK exemption, its purpose nevertheless is to prohibit public disclosure of a recording of judicial proceeding. Reading Section 708 *in pari materia* with Crim. P 112 would suggest that the rule is a "judicial order or decree" requiring exemption under Section 708. Likewise, a court employing video surveillance recording could enter a standing order barring its production.

Finally, Section 708 includes several exceptions to disclosure for the protection of public safety and individual security.³ These would arguably apply to judicial security recordings, particularly if written policies were adopted which explicitly describe how security and safety of individuals would be compromised by general disclosure of the video to the public on demand.⁴

³ 708 (b) Exceptions. — Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(1) A record the disclosure of which:

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate federal or state military authority.

⁴ For example, even though persons in the gallery are exposed to everyone else in the courtroom, a gang member on trial could use video recordings to assist in later identifying persons present, including rival gang members or circulate the video as part of a scheme to publicize and harass family and friends of the victim.

D. The Public's Expectations of Privacy

Though courthouses and courtrooms are public places, recording the images of citizens attending the proceedings could raise concerns about individual privacy rights. To alleviate any concern, strict written policies concerning control and use of equipment and the images they record and store would be highly advisable.

IV. Suggested Policy Framework.

As noted throughout this paper, several legal and practical issues make it highly advisable that policies governing the installation, ownership and use of video surveillance equipment be adopted. A uniform policy applicable across the state might be impractical, however. Each judicial district in the Commonwealth has its own unique set of circumstances that must be taken into consideration in developing specific procedures. For example, some districts have a single courtroom while others have dozens. Courtroom layout and dimensions vary, even within a single courthouse. Some districts have existing sophisticated technology capabilities which can be leveraged, while others are extremely limited. Though presumably most districts have limited budgets for technology, some are able to spend more than others. Likewise, risks which a system is designed to reduce may differ from district to district.

For these reasons, the Supreme Court should issue general guidelines which require the local court and sheriff to establish written MOU's and specific policies that take into account the judicial district's needs and circumstances. To ensure local policies meet minimum requirements, the Court could require AOPC involvement in their development or perhaps even AOPC approval of policies before implementation.

Written policies should, at a minimum, include the following:

- Establish that the video data and equipment, while under the sheriff's office physical custody and control, remain the property of the court and that any recording be deemed the record of the court.
- Establish limits on how cameras will be positioned and operated so as to record only the public gallery and minimize the chance of recording the judge, jury, parties, stenographer or attorneys or the bar of the court
- Identify how and where notification to the public about the presence of cameras and video recording will be provided, including the placement of signs in languages common to the local community.
- Identify who specifically is responsible for:
 - Placement and control of cameras

- Control and storage of data in the video recorders
 - Disposal of data no longer needed
 - Training of court personnel and persons operating the system
 - Security of the system to prevent unauthorized access
 - Maintenance and costs associated with operation
- Prescribe the minimum and any maximum period data will be stored before disposal
 - Identify required methods for complete disposal or overwriting of data to ensure proper destruction
 - Define the parameters for use of surveillance video recording in criminal or other investigations or court proceedings
 - Identify the availability of and procedures for obtaining copies of video for use in criminal investigations involving incidents recorded or other criminal investigations where the recordings may have value.
 - Identify the availability of and procedures for obtaining copies of video for non-investigative, but other official purposes.
 - Provide detailed requirements for storage and disposal of digital copies made for purposes of investigations
 - If real-time remote monitoring is used, establish security requirements to ensure against unauthorized viewing
 - Prohibit the use of audio recording ⁵

Respectfully submitted,

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⁵ The able assistance of Doug Moak, Temple University Law Student, who provided excellent comments, editing and research assistance in the preparation of this document, is gratefully acknowledged.