

## Report: Pilot Video Testimony in District Court

(Pilot Date: Thursday May 26, 2016 in Greensboro, N.C.)

John Byrd, Director, North Carolina State Crime Laboratory

William P. Hart, Jr., Assistant Attorney General, North Carolina Department of Justice

### Summary

Video testimony holds some promise and can be implemented satisfactorily from a technical perspective with the appropriate level of funding. Questions remain among NC criminal justice stakeholders as to how such testimony will play out in a real-world application and on a district-by-district basis. From the perspective of the N.C. State Crime Laboratory (SCL), a key principal for the reduction of case inventory post-*Melendez-Diaz* remains the maximization of “bench time” so that forensic scientists can spend more time on analysis and less time waiting to testify in the courtrooms or on the road traveling to court. Video testimony is another potential resource for reducing courtroom wait times *while also negating the need to travel long distances*. If implemented strategically for certain districts, remote testimony has the potential to greatly benefit the State. Other states are actively utilizing video testimony for scientific testimony in certain circumstances.

### Introduction

The DOJ/AOC pilot video testimony presentation for laboratory analysts in NC District Court took place on Thursday May 26, 2016 in Guilford County—Greensboro Courtroom 3D. The witness-analyst testified remotely from a location in Raleigh, N.C. Presiding over the pilot hearing was the Honorable H. Thomas Jarrell, Jr., now-Chief District Court Judge, Guilford County. Participants and observers included prosecutors, public and private defense attorneys, and a representative from AOC, among others in the criminal justice field.

The May 2016 pilot was the culmination of a year-and-a-half-long process, initiated at the request of the General Assembly, involving several stakeholder meetings and extensive technical planning by multiple personnel. The project was spearheaded by members of the DOJ Information Technology Division (ITD), State Crime Lab managers, and DOJ attorneys. Representatives from the Administrative Office of the Courts, the Conference of District Attorneys, the Office of Indigent Defense Services/Public Defenders’ Offices, offered key support and/or consultative roles throughout the planning process.

Various technical “proofs of concept” had been performed previously. The May 2016 pilot served as a final proof of concept using real courtroom participants (judge, prosecution, defense, and witness-analyst) and the presentation of testimony concerning mock laboratory analysis (in this instance, toxicology—DWI blood-alcohol).

Overall, participants and observers were pleased with the pilot test setup/parameters in terms of providing a realistic opportunity to see first-hand how video testimony from laboratory analysts might be presented in a real case. In addition to written feedback forms, the testing forum provided opportunity for robust and collegial live discussion among all parties on issues such as technology, discovery, logistics, etc.

Survey forms were completed by all non-DOJ stakeholders present for the pilot, with respondents including Chief Judge Jarrell, two prosecutors, four defense attorneys (three public; one private), and one other AOC representative for a total of eight survey responses. Although DOJ observers (ITD staff, SCL managers/staff, and a DOJ attorney) did not complete the stakeholder survey forms, they participated in the post-pilot group discussion and expressed general consensus that the pilot had carried through successfully. The survey forms requested participant/observer ratings and feedback for four categories: **technical setup; flow of testimony; Confrontation Clause issues; and bottom-line viability for use of SCL video testimony in the courtroom**. Average ratings set out for the first two categories represent the mean of the rating given by participants on a scale from 1 to 10, with 10 being the best.

### Technical setup (Avg. rating: 8/10)

- The quality of the audio/video connection was mostly praised. One defense attorney noted some minor video pixilation problems and the fact that the flow of testimony could become problematic if the audio/video connection is not at or above the level achieved during the pilot.
- The document display format was widely critiqued. For purposes of the pilot, DOJ/AOC were able to borrow two document cameras, one for the courtroom and the other for the witness. Limitations noted included the fact that the document cameras acquired were a bit outdated and also that the document camera itself is not conducive to sufficiently share documentation in this format (at least, not standing alone). Related observations about the document display are noted in the remaining sections discussing flow of testimony and confrontation.
- The “share” function for showing documents via the document cameras was controlled on the courtroom side by the judge and on the witness side by the witness. Additionally, by default the judge was able to see documents shared by the attorneys and the witness unless the judge’s document screen was turned off. These two aspects of the setup were mentioned as creating some confusion in the management of document sharing. It is anticipated that a different configuration would be possible as set up by an integrator. Also, the consistent use of remote testimony will afford local courts the opportunity to adopt acceptable, routine procedures.
- One additional comment of note was that multiple monitors in front of the judge make it problematic for the judge to view the witness stand for the live testimony of other witnesses in a given case.
- Courtroom configuration for each county may vary in accordance with the preferences of judges and other local personnel. Additional costs may be associated with equipment changes or special configuration of the software.
- The witness setup at the remote location was not the subject of any specific comment in the survey forms and appeared to be well received overall.

### Flow of Testimony (Avg. rating: 7.6/10)

- In terms of audio/video, there was high praise for the flow of questioning when not tied to any document sharing. Some amount of overlap in speech from attorneys and the witness had been anticipated but the parties adapted well to the format and avoided such cross-talk.
- The document-sharing process had some criticism. The primary limitation of the document camera is that it could not easily/quickly facilitate the sharing of multiple documents if necessary. For purposes of the pilot, all laboratory documentation was pushed out to both prosecution and defense several days prior to the hearing.
- Nevertheless, even with full pretrial discovery, the parties in the courtroom could not easily verify that the printouts/notes used by the remote witness in Raleigh were the same as those provided beforehand in discovery. Possible technical fixes for this issue may include batch scanners located at the remote testimony site or other similar arrangements for accessing such documents, allowing the witness to forward all of the notes brought to the testimony room to the prosecution (and defense) immediately prior to testifying.
- Identification of exhibits by the witness took longer than for a typical live witness because of time spent zooming in and out with the document camera. Enhanced technical capabilities could, in theory, provide the opportunity to more clearly view the entire page of a single document without having to move it around at a “zoomed-in” view.
- Discovery, in particular, was the subject of extended discussion among the group and in the feedback surveys. The defense representatives universally agreed that open (laboratory) file discovery should be the norm for video testimony regardless of the type of case. Under current N.C. Gen. Stat. § 20-139.1(c5), only the toxicology report itself must be provided ahead of time for remote forensic testimony in DWI trials. This contrasts with N.C. Gen. Stat. § 15A-1225.3(b)(1) which requires, for non-DWI remote forensic science testimony, disclosure of “the full laboratory report package provided to the district attorney.”\*  
*\* Most non-DWI cases involving forensic analysis would be subject to open file discovery under N.C. Gen. Stat. § 15A-901, et seq. (“Discovery in the Superior Court”).*
- Prosecution representatives expressed some concerns about whether an added discovery requirement for DWI trials would render the remote testimony process too cumbersome to be worthwhile in district court. However, prosecutors agreed with the judge and AOC representative that some accommodation may be necessary to facilitate viewing of *at least that portion of the file* which the witness brings to the testimony room (just as when a live witness brings notes to the witness stand for reference). As discussed above, the sharing of notes that the witness has on hand can be facilitated with additional technical resources at one or more remote testimony

locations at some additional equipment cost, such that criminal defendants would be at no disadvantage relative to current district court proceedings for live testimony of analysts.

### **Confrontation Clause**

Respondents were asked a **yes/no/unsure** question whether the pilot format for video testimony would satisfy the requirements of the Confrontation Clause of the Sixth Amendment to the Constitution of the United States. Respondents were asked not to consider other matters, such as whether the video testimony proceeded based upon a notice/demand provision\* and/or the right of appeal de novo to superior court wherein live testimony might be presented.

*\* As currently structured, video testimony requires a notice-and-demand process under N.C. Gen. Stat. §§ 15A-1225.3 and 20-139.1(c5). And although these provisions also permit video testimony in superior court, the DOJ/AOC project was limited in scope to district court proceedings with the idea that cases appealed to superior court would likely involve live witnesses.*

Defense representatives universally answered “no” to the confrontation question. Although some critique was leveled at the pretrial discovery question, the crux of the opposition was rooted in the video testimony format itself. Quoting in pertinent part, some of these points were presented as follows:

- “There is not a compelling policy interest to justify use of video testimony.”
- “All witnesses should be exposed to the feeling of going up on the witness stand in front of all court observers. Through video, chem. analyst is able to testify from comfort of office—where they could retrieve any documents they might have not had on hand. It is very difficult for people to testify from witness stand—everyone should have same experience.”
- “The State will not allow our witnesses and clients to testify from the comfort of their homes.”

*Note: as conceived for SCL, witness video testimony would be set up in designated rooms at one or more laboratory facilities and would not be presented from an analyst’s individual workspace environment.*

All other respondents answered “yes” to the confrontation question. Some noted the importance, in reaching this determination, of a defendant’s ability to confront not only the witness but also the documentation that the witness has in front of him/her. One “yes” response stated the overall position as follows:

- “Clear opportunity to see/hear/cross analysts.”

No contrary point was made in terms of the ability of all parties to observe the witness’ demeanor and the ability of the defendant to engage in a full and complete cross-examination, subject to the document issues discussed elsewhere.

### **Viability**

Respondents were asked a **yes/no/no opinion** question whether video testimony would be a viable option for their respective district court or, alternatively, from a statewide perspective. The overall response was divided. Some highlighted comments representative of the opinions include the following:

- “Not yet”
- “Lots of training (technology & policy) for judges/DAs/clerks”
- “I’m reserving my opinion as to viability at this time until the technology & exhibit issues are resolved.”
- “Depends upon jurisdiction & cooperation of DA & defense”
- “Consider not charging expert witness fee for remote video testimony.”
- “If the State is going to proceed, the ADAs must provide full digital Discovery prior to use of this procedure.”

### **Conclusion**

Video testimony holds some promise and can be implemented satisfactorily from a technical perspective with the appropriate level of funding. Questions remain among criminal justice stakeholders as to how such testimony will play out in a real-world application and on a district-by-district basis.

Nevertheless, there is every reason to believe based upon the pilot presentation that remote testimony is capable of at least satisfying the current statutory criteria: that (a) “[t]he method used . . . shall allow the trier of fact and all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying in the location where the hearing or trial is being conducted” and that (b) “the defendant . . . has a full and fair opportunity for examination and cross-examination of the analyst.” See N.C. Gen. Stat. §§ 15A-1225.3(c), 20-139.1(c5).

From the SCL’s perspective, a key principal for the reduction of case inventory post-*Melendez-Diaz* remains the maximization of “bench time” so that forensic scientists can spend more time on analysis and less time waiting in courtrooms or on the road traveling to court. Implementation of Memoranda of Agreement in several judicial/prosecutorial districts has helped, in part, to promote general awareness of this issue. Video testimony represents another potential resource for reducing courtroom wait times *while also negating the need to travel long distances*. If implemented strategically for certain districts, remote testimony has the potential to provide benefit to the State.

Visuals featuring Courtroom and Remote camera positions are below to assist with greater understanding of the pilot.



For more information, please contact Robert Pascal, NC Department of Justice legislative liaison [rpascal@ncdoj.gov](mailto:rpascal@ncdoj.gov) or 919-716-6569.