

## COVID, Courts, and Incarceration: A Healthier Justice System in 2020

- Ten years of change in ten weeks: Technology transforming the system
- Video courts then and now: Necessity is the mother of invention
- Defense attorneys: Confidential communications with in-custody clients

### *Our Challenge, Compounded in the Age of COVID-19*

Who would have thought it would take a pandemic to make the justice system healthier? In our shared COVID-19 challenge, our courts have experienced 10 years of change in the last 10 weeks. Our goal is a safer and more efficient criminal justice system. Technology has stepped into the breach out of necessity. Because states of emergency will happen again, and because the cost savings and convenience everyone is experiencing during this pandemic have been welcome byproducts, technology will remain in place forever hereafter. Legislatures everywhere will debate turning into law the emergency executive orders and judicial decrees that have removed previous statutory impediments to conducting remote proceedings. Funding will follow those decisions and is already available through [Bureau of Justice Assistance grants](#).

For over 15 years I have served as the elected DA in my hometown of Wilmington, NC. During that time I have been obsessed with searching for new ways to utilize evolving information and technology to run our courts more efficiently and safely, while upholding the rights of victims and those charged with crimes, particularly those who are in custody. However, the principle of due process is imperiled by social distancing and other logistical constraints that COVID-19 has wrought upon our courtrooms. Our local response? Accelerating and expanding the use of technology implemented long ago.



*Assistant District Attorney Jon David (left) and pretrial release coordinator Dottie Thomas (center) listen from the courthouse as the defendant takes his oath Friday. Source: Wilmington Star News, Jan. 15, 2005*

In January 2005, our county [installed cameras at the courthouse and the jail](#) to transmit video between the building miles away. This innovation laid the groundwork for how courts could remain operational during (and surely after) the COVID-19 pandemic. When we first created our video courtroom, it was for logistical reasons. Our 350-bed detention facility, connected by underground tunnels to the courthouse next door, was bursting at the seams. When we relocated the jail eight miles into the suburbs and increased its size to 500 beds, justice officials in Wilmington were confronted with the same two due process challenges that every courthouse now faces during the pandemic: (1) safety and (2) convenience. For us, back then, safety meant protecting the public from prisoners (soon after moving the jail, a convicted first-degree killer escaped from a transport van bringing him to the courthouse). Now, for everyone, the problem is reversed: we must protect inmates from infection from the outside world. Detention facilities have become like cruise ships, adrift and looking for safe harbor. Justice

officials are loathe to bring defendants to the courthouse, only to return them to custody after the case is resolved. Prisons have stopped accepting inmates from jails, and if inmates are transported by writ to local facilities for court business, the prisons do not want them back for fear of contaminating their

prison population. Effectively, once the outside world sees an inmate, the detention facility is hamstrung—they might be bringing patient zero back into their closed system. As for convenience: at the time we moved the jail, we could no longer summon and conjure inmates within minutes of needing them (and those moments were coming up for us with far greater frequency than we had initially anticipated).

Discussions regarding this video courtroom started months earlier, and included judges, clerks, prosecutors, and sheriff's officials. The state-of-the-art courtroom worked well. Defendants remained at the jail in a room equipped with a video camera. A judge, prosecutor, and clerk remained in the courtroom, all visible to the defendant who appeared before them on a large screen. The courtroom was effectively a Zoom meeting between an unrepresented inmate and the judge, prosecutor, and clerk. Bailiffs on both sides of the call handled moving the prisoners within the screening room and paperwork.

In time, however, many defendants requested the option of pleading guilty during their video first appearances, aware that, in many instances, they could resolve their cases for "credit for time served." Obviously, these defendants needed counsel to ensure that the plea was in their best interest. At the time the video courtroom was developed, we did not contemplate handling anything beyond first appearances. Consequently, the defense attorneys were not included in our planning discussions and concerns they would have raised went unheard.

An additional challenge to the relocated jail emerged: many inmates complained (on video to the judges, and later in jail mail, as they awaited trial) that they were not able to speak with their attorneys, who were not visiting the new facility with the same frequency as when the jail was conveniently located next to the courthouse. Visitation logs at the jail supported their claims. (These same complaints are emerging everywhere around the country during our current pandemic. Defense attorneys are finding it dangerous, for their own and their clients' health, to meet those they represent at the jail face to face. In this day and age of COVID-19, many cases that could otherwise be handled expediently sit idly on criminal calendars with no resolution in sight because safe client interaction is difficult, if not impossible.)

Meanwhile, bailiffs complained that many inmates who they were transporting to the courthouse at the request of the defense attorneys were not actually making it into the courtroom. Instead, these inmates were merely meeting with their attorneys in a holding cell and not appearing before a judge, before being returned to the detention facility. Effectively, deputies were becoming a taxi service to accommodate in-person meetings for inmates and their attorneys and many calendared cases were getting continued.

Our video courtroom's breakdown 15 years ago involved the same issue confronting every court system today: even as all other justice stakeholders are mandating remote courts, defense attorneys must be able to have confidential conversations with their clients. They are understandably concerned that any remote communication may be monitored and later used in a courtroom. In several prominent examples in my District, defendants' recorded jail calls to friends and family members were admitted at trial and proved crucial for conviction. For defendants, the culture became, "do not talk to anyone by phone about your case, even your lawyer." This culture persisted for years, despite assurances that attorney/client communications were privileged.

Once first appearances were expanded to pleas and defendants were pleading from jail without representation, we were faced with the criticism that inmates were sacrificing Constitutional protections on the altar of efficiency. The American legal system's roots in English Common Law are

not without their unfortunate traditions, from which we have learned critical things NOT to do. One such tradition was the King's *Star Chamber*, which sat at Westminster Palace from the late 1400s to 1641, doling out its version of "justice" in secret deliberations, totally removed from the public eye. From this, our forefathers learned the immeasurable import of airing criminal matters in the town square where the broader communities can monitor and balance the rights of the accused against the interests of the public and its government. This principle of transparency in a public forum is foundational to our notions of due process and a fair trial in the United States. So too, of course, is the right to counsel.

The distinction must be made that not all video communications are created equally nor should this technology be used for the same purpose. The sacrosanct attorney-client privilege must be observed alongside this principle of transparency. Video courtrooms allow for this transparency while providing the convenience, safety measures, and adherence to due process required in a 21<sup>st</sup> century judicial setting. Can the technology that facilitates remote appearances by defendants coexist with client confidentiality?

### *The Solution, Now and After the Pandemic*

About 10 years ago, soon after a public defender's office was established in Wilmington, our defense bar grew more organized and made a request: to create an impenetrably confidential video service for communication between inmates and their attorneys. This video communication takes place in dedicated secure rooms at custody facilities, not on the same phones that are being monitored when inmates call friends and family members. Seemingly overnight, defense attorneys were enabled to communicate with their incarcerated clients anytime, anywhere. The widespread use of the system and improved access to their attorneys created trust in the technology by the inmate population.

Even in an adversarial system, everyone agrees that this added piece of technology has proven itself to be the missing piece to our puzzle. Secure remote communication greatly enhances access to defense counsel for all incarcerated defendants, but also allows for many cases beyond first appearances to be handled in our video courtrooms including: arraignments, bond hearings, probation violations, and some guilty pleas. Everyone took pride when our jurisdiction was recognized as the most efficient jurisdiction in the State for case age at time of disposition. Ultimately, complaints from inmates and bailiffs about defense attorneys not meeting with their clients has greatly decreased.



If I could go back 15 years, to the infancy of my involvement with this technology movement, I would urge my younger self to have a defense attorney representative at the table alongside the other justice stakeholders. Today, I also urge all justice officials to also include a representative from their state's prison system. If this same technology can be deployed between courthouses and the prisons in your state, there would be a tremendous cost savings on transportation of inmates returning to your county to handle pending matters.

It should be remembered that it takes five officials to run a courtroom: (1) a judge, (2) a clerk, (3) a prosecutor, (4) a defense attorney, and (5) a bailiff (a sixth official, a court reporter, is necessary

for courts of record). Conspicuously absent from this list is the person charged with the offense. What many are learning during this pandemic is that, in most cases, the defendant's physical presence in the courtroom is simply not feasible, and also not required. Approximately 98% of all cases in the criminal justice system are resolved through non-jury disposition. To be sure, Sixth Amendment confrontation rights will still be raised in contested hearings, and there will be times when a criminal defendant needs to appear in court. Judges should also take great care to ensure defendants are waiving their right to be present in even uncontested matters. We should not, however, let those limited cases prevent us from embracing the possibilities that technology can bring for everyone.

Many minor cases will move entirely online. In my District we have over 50,000 traffic tickets each year. To manage this volume, we developed an administrative court that placed hundreds of these traffic cases to a dedicated setting, removing them from dockets filled with misdemeanor cases. In recent years, [online services](#) have helped us to further manage this load. The pandemic has not only led to increased use of ECAD (Electronic Compliance and Dismissal) and iPlea (an online request for reduction in cases that do not impact insurance), but also expanded services to online driving school and digital payment of fines.

Technology will ultimately provide the biggest opportunities for the most serious offenses: cases that overwhelmingly involve incarcerated defendants. For the 20,000 misdemeanors and 5,000 felonies that come through this District every year, the video courtrooms that we have relied upon for years will grow in the number and types of cases handled. Not only are we expanding the number of courtrooms in metro New Hanover County (which has long utilized video technology), but our rural county, Pender, is following suit. Many courthouses and state and federal detention facilities throughout eastern North Carolina are similarly adopting this technology.

In North Carolina, all one hundred counties have a courthouse and a jail—facilities that are funded at the county level. However, the employees working at the courthouses (judges, clerks, DAs, and public defenders) and the 55 prisons scattered throughout North Carolina are state-funded. State officials and county commissioners must all be on the same page to link up the jails and prisons with the courthouses where the business of justice takes place.

To protect everyone's health, and the constitutional rights of citizens charged with a crime, secure lines of communication must be in place in every jail and prison for defendants and their attorneys. Open lines of communication are needed between state, local, and federal officials, as these detention facilities are connected to the courthouses where all of us work. If we do this the right way, our nation will emerge from the COVID-19 pandemic with a silver lining: a safer, healthier and more efficient criminal justice system.

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