STATE OF WISCONSIN **IN THE SUPREME COURT**

In re amendment of SCR 71.01, regarding required court reporting

ADDENDUM TO PETITION 09-05

On June 5, 2009, the Director of State Courts filed a petition to amend the Supreme Court Rules to establish that court reporters need not transcribe audio and audio-visual recordings played in court, when marked as exhibits and offered into evidence. This addendum to the petition addresses the experience of other courts and addresses case law from the court of appeals applying *State v. Ruiz-Velez*, 2008 WI App. 169, 314 Wis. 2d 724.

1) Experience of other state and federal courts. The new petition instructions ask that the petitioner identify the experience of other state or federal courts if applicable.

The language of the federal Court Reporter Act is similar to the language of SCR 71.04, "all proceedings in the circuit court shall be reported". The federal Court Reporter Act, 28 U.S.C. §753 (b), provides:

> Each session of the court … shall be recorded verbatim by shorthand, mechanical means, electronic sound recordings or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. … Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court…

Several federal cases have considered whether verbatim recording of "all proceedings" means the court reporter must transcribe recordings played as evidence. The federal case law is summarized by an article by Professor Clifford S. Fishman, *Recordings, Transcripts, And Translations As Evidence*, 81 Wash. L. Rev. 473 (August 2006).

> The Court Reporter Act requires that "all proceedings in criminal cases [held] in open court ... shall be recorded verbatim." This provision does not, however, require a court stenographer to transcribe the contents of recordings that are played as evidence at a trial. n190
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> > n190. *United States v. Morales-Madera, 352 F.3d 1, 6-7 (1st Cir. 2003)* (rejecting statements to the contrary made in *United States v. Andiarena, 823 F.2d 673, 676 (1st Cir. 1987)); United States v. Craig, 573 F.2d 455, 480 (7th Cir. 1977)* (concluding that there was "no merit" to the claim that the Court Reporter Act was violated because the reporter did not transcribe a recorded

> conversation). But see *United States v. McCusker, 936 F.2d 781, 785 (5th Cir. 1991)* (suggesting that although the court reporter is obliged to transcribe a recorded conversation, where the recording of the conversation is available on appellate review, the error is harmless). No court - not even the Fifth Circuit - has ever cited *McCusker* approvingly for this proposition, and it has been criticized or differentiated by at least two courts. See *Morales-Madera, 352 F.3d at 6-7;* see also *Emmel v. Coca-Cola Bottling Co. of Chicago, 904 F. Supp. 723, 752 (N.D. Ill. 1995).* Moreover *McCusker* held that if such an obligation existed, where the recording of the conversation is available on appellate review, the error is harmless. See *McCusker, 936 F.2d at 785.*

The Director's Office checked with the Court Reporting Program of the Administrative Office of the United States Courts to find out how this issue is handled by federal court reporters. Court reporting program specialist Edward Baca responded that "Normally, the actual tape or CD is marked as an exhibit with a parenthetical note on the transcript that the exhibit was played for the jury." He referred to the *Guide to Judiciary Policies and Procedure* developed by the Judicial Conference of the United States, Volume 6.18.10.1.c:

> Reporting of Audio/Video Recordings. Generally, audio/video recordings played in court are entered as an exhibit in a proceeding. Since such recordings are under the direct control of the court, audio/video recordings need not be transcribed unless the court so directs.

Lynette Swenson, court reporter for Judge Barbara Crabb, Western District of Wisconsin, said her practice is to ask the judge if she should transcribe the recording while it plays, and Judge Crabb asks the attorneys to stipulate that the reporter need not do so. Usually the proffering party brings copies of a transcript and the jurors read it as the recording is played. Both the tape and the transcript are admitted into evidence, along with a stipulation to the portions that were played.

The Director's Office also asked the National Center for State Courts to review statutes and court rules found in their library to see if other courts address whether a court reporter should or should not transcribe audio evidence. The NCSC librarians found only two rules that address this question specifically:

- California Rules of Court, Rule 2.1040 (2009). This rule requires that the proffering party submit a transcript and that the court reporter need not transcribe the recording.

Rule 2.1040. Electronic recordings offered in evidence. (a) Transcript of electronic recording. Unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript must be marked for identification. A duplicate of the transcript, as defined in *Evidence Code section 260*, must be filed by the clerk and must be part of the clerk's transcript in the event of an appeal. Any other recording transcript provided to the jury must also be marked for identification, and a duplicate must be filed by the clerk and made part of the clerk's transcript in the event of an appeal.

(b) Transcription by court reporter not required. Unless otherwise ordered by the trial judge, the court reporter need not take down or transcribe an electronic recording that is admitted into evidence. (emphasis added)

- Massachusetts Rules Of Civil Procedure 30A. This rule requires that the court reporter transcribe the recording as if it were testimony. There does not appear to be a parallel provision in the criminal rules, but Dana Levitt, of the Administrative Office of the Superior Courts, advised the Director's Office that criminal matters are handled the same way.

(h) Transcribing of Audio Portion; Marking for Identification. At a trial or hearing, that part of the audio portion of an audio-visual deposition which is offered in evidence and admitted, or which is excluded on objection, shall be transcribed in the same manner as the testimony of other witnesses. Both the original unedited audio-visual recording and the edited version shall be marked for identification.

(k) Evidence by Audio-Visual Recording.

(1) Authorization of Audio-Visual Testimony or Other Evidence. Upon motion with notice and an opportunity to be heard, or by stipulation of all parties approved by the court, or upon the court's motion, the court may order, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, that all or part of the testimony, and such other evidence as may be appropriate, may be presented at trial by audio-visual means. The provisions of Rule 30A shall govern such audio-visual recordings.

(2) Introduction as Evidence. …

(3) Objections. …

(4) Part of the Record; Not an Exhibit. Any portion of the audio-visual recording so introduced shall be part of the record, and subject to the provisions of Rule 30A(h), but not an exhibit. (emphasis added)

2) Other related cases. On May 5, 2009, the District I Court of Appeals applied the decision in *Ruiz-Velez* to require the court reporter to transcribe digital recordings made by undercover officers wearing hidden recording equipment. This decision does not distinguish between recordings offered in lieu of testimony, as in *Ruiz-Velez*, and recordings offered as evidence. The error was found not to be ineffective assistance of counsel. The court in *State v. Huff*, 2009 WI App. 92, ¶14-16, stated:

> As we have seen, the trial court did not require its court reporter to take down the tapes as they were being played. This was error. *See State v. Ruiz-Velez*, 2008 WI App 169, 314 Wis. 2d 724. [footnote omitted] Huff did not object to the trial court's decision to not have the tapes reported as they were played, and accordingly, the error was forfeited and we thus analyze the issue under an ineffective-assistance-of-counsel rubric….
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> Huff has not even alleged, no less shown, how not reporting the audio tapes as they were played prejudiced him. As noted, he has not made either the tapes or the transcript part of the appellate Record, and has not, therefore, shown us that anything in those tapes was exculpatory. Accordingly, we do not discuss further the trial court's violation of the law recognized by *Ruiz-Velez*….[1]

Briefing is currently in progress in *State v. Elam*, 2009 AP920-CR, in the District I Court of Appeals. The state in *Elam* argues that the trial judge cannot require the State as proponent of the evidence to submit the transcript of an interview with a child sexual assault victim, and that the court reporter would not be relieved of the obligation to transcribe the statement even if the State did so. The defendant argues that the trial court can require the State to produce a transcript, arguing that the statement of a child sexual assault victim under Wis. Stats. 908.08 is akin to a deposition introduced under SCR 71.01(2)(d). The defendant also argues that the court reporter is still required to produce an official transcript.

On February 6, 2009, Judge Hoover of the District III Court of Appeals issued an order in *State v. Kevin Knight*, 2009XX158-CR [Rusk 2006CF68], declining to apply *Ruiz-Velez* in a motion for extension of time. In *Knight*, the circuit court judge asked the court reporter not to transcribe an audio-visual tape of Knight's questioning by police as

[1] This court denied review of the Court of Appeals decision on July 16, 2009. Following remittitur, the circuit court record of a status conference on August 19, 2009, states the defendant filed a petition with the U.S. Supreme Court for review. [Milwaukee 2007CF2620]

it was being played during trial. Knight cited *Ruiz-Velez* for the proposition that the tape should have been transcribed by the court reporter at trial, and therefore he should be given additional time to get the tape transcribed. Judge Hoover found that *Ruiz-Velez* was distinguishable on its facts, because a statement to police is not the same as child victim "testimony" requiring transcription pursuant to Wis. Stats. §885.42(4). Regardless, Judge Hoover allowed the extension of time to obtain the transcript.

Respectfully submitted this _____day of _____, 2009.

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A. John Voelker
Director of State Courts