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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-20-0013
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Various Rules of	)	**ATTORNEYS FOR CRIMINAL**
Procedure Related to Creating the	)	**JUSTICE REGARDING PETITION**
Verbatim Record of Judicial	)	**TO AMEND VARIOUS RULES OF**
Proceedings	)	**PROCEDURE RELATED TO**
	)	**CREATING THE VERBATIM**
	)	**RECORD OF JUDICIAL**
	)	**PROCEEDINGS**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submit the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of

criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the proposed amendments to the Rules of Procedure related to creating the verbatim record of judicial proceedings. First, the proposed changes threaten the proper preservation of the record in court proceedings. Second, appellate practitioners, many of whom are AACJ members, have not reported any systemic issues related to delays in production of transcripts, nor does there seem to be any evidence of a court reporter shortage in Arizona.

Audio recordings present unique problems for court record preservation. It is typical for portions of an electronic recording to be inaudible, either because the speaker is too quiet, speaks too quickly, or when multiple people are speaking over one another. When a court reporter is present, however, the court reporter ensures that every portion of the proceedings are audible. For example, the court reporter asks people to speak up, slow down, or repeat what was just said. Or when multiple people are speaking at once, a court reporter can interrupt the proceeding to have the judge explain the importance of having only one person speak at a time. Of course, like everyone else, court reporters make mistakes, *see State v. Diaz*, 223 Ariz. 358, 360 ¶ 9 (2010) (describing transcription error in jury polling), but having a court

reporter transcribe the proceedings in real time significantly reduces the occurrence of such errors.

Worse than inaudibility, sometimes electronic recording systems fail to capture the proceedings entirely, either due to computer error or human error. When portions of the record become unavailable for appeal, appellate courts will be placed in a Morton's fork. Either they will be compelled to make assumptions about those missing portions of the proceedings, or they will be compelled to order a new trial.

Ordinarily, "[w]here matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). But this rule should only apply when the appellant is responsible for failing to order that the missing portions of the record be transmitted to the appellate court. *See State v. Olague*, 240 Ariz. 475, 478 ¶ 7 (App. 2016). For appellate courts to invoke this presumption with an incomplete record due to a recording error would undermine the right of appeal and violate the appellate and due process rights of the accused. *See State v. Schackart*, 175 Ariz. 494, 498-99 (1993) (citing Ariz. Const. art. II, § 24).

On the other hand, where the lack of a record is through no fault of the appellant, appellate courts may view the matter very differently. In *State v. Sahagun-Llamas*, 248 Ariz. 120 (App. 2020), the court of appeals recently reversed

convictions based on a partial missing transcript from a trial that had occurred more than a decade earlier. There, the court first noted that "the Arizona Constitution requires the record to be sufficient to 'afford defendant a meaningful right of appeal.'" *Id.* at 123 ¶ 11 (citing *Schackart*, 175 Ariz. at 498-99). The court then concluded that in the "absence of any transcript of the defense case," the accused is "deprived of any appellate opportunity to challenge adverse evidentiary rulings that may have occurred," thus requiring a new trial. *Id.* at 125 ¶ 22. Such a ruling, while protective of the accused's right to appellate review, would necessitate the ordering of new trials in far greater numbers.

The concerns raised above about the absence of a complete record due to human or computer error are heightened when the outcome of the court proceeding at issue can dramatically affect one's right to life and liberty, such as grand jury proceedings, capital case proceedings, felony jury trials, and the initial determination of sexually violent person status. While the proposed rule changes explicitly "provide courts with the discretion to use court reporter *or* electronic recording" at such hearings, Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings ("Petition") at 8 (emphasis in original), as explained above, these rule changes ignore the risks associated with relying solely on electronic recordings.

Additionally, the proposed rule changes are a drastic remedy searching for a problem. Assuredly, there are times when courts have difficulty finding a certified court reporter, a problem that is likely greater in rural counties. But rather than prioritize the use of court reporters at the most important court proceedings, like capital case proceedings and felony jury trials for example, the proposed rule changes would allow courts to completely do away with court reporters without first making any effort to ensure that a court reporter is in fact not available. Moreover, the Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings fails to acknowledge that the vast majority of requests made for court reporter from rural counties are filled, instead relying on problems faced by courts in South Carolina as a reason to make dramatic changes to the rules in Arizona. Petition at 2.

Moreover, the Petition cites to Administrative Order 2019-49 which notes that "transcript production is 'one of the major factors contributing to delay in resolving appeals.'" Petition at 3. Yet the rule changes proposed in the Petition will only exacerbate those problem as the need for transcript production will likely increase with the rise in the use of electronic recordings. Neither appellate attorneys nor appellate judges will want to listen and re-listen to audio recordings of lengthy trials and will instead demand transcripts be produced of any record that consists of audio recordings.

Finally, the proposed rule changes create the new "right" allowing a party to provide a court reporter. Yet the changes also require that party "bear the cost" of the certified reporter. As such, this "right" is illusory as most criminal defendants in Arizona are indigent and would be unable to bear such a cost. Moreover, in the case of grand jury proceedings, the criminally accused are rarely aware that they are the subject of such proceedings making it virtually impossible to provide a court reporter even if they were able to bear the cost.

For these reasons, AACJ opposes the Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings.

DATED: May 1, 2020.

By /s/ Jared G. Keenan
Jared G. Keenan

This comment e-filed this date with:

Supreme Court of Arizona