

Representative Cases of Electronic and Digital Recording Failures in the U.S. Court System: Evidence Supporting the Use of Certified Shorthand Reporters to Provide the Record

NOTE: This is not intended as a complete or exhaustive list of failures.

South Carolina v. Alex Murdaugh (2023)

The defendant is being tried for murder in a high-profile case in the South Carolina Circuit Court, 14th Circuit. During the trial, defense counsel ordered a rough draft transcript. The next day, there was a discussion in court about the poor quality of the rough draft, and that they had paid FTR, a digital recording company, \$450 for a “deficit” product that was “not of much use.” **See Attachment 9

Cleveland v. McGervey (2022)

Defendant was convicted of aggravated disorderly conduct. Upon appeal, it was found that the court’s audio recording system was not turned on until the prosecution’s cross-examination was underway. The appellate court found that “meaningful appellate review cannot be achieved in this case given the magnitude of the missing record” and ordered a new trial. **See Attachment 10

State of Wisconsin v. Darrell E. Brooks (2022)

Defendant Darrell Brooks drove into a Christmas parade in Waukesha, Wisconsin, killing six people and injuring 62. He had previously been released on bail. The bail hearing was not recorded, which was discovered when the transcript was requested to shed light on why he had been released on bail. **See Attachment 1

Parole Hearing of Daniel Bezemer (2022)

Convicted murderer Daniel Bezemer was denied parole in an August 10, 2022, hearing before California’s Board of Parole Hearings. It was subsequently discovered that the hearing had not been recorded. The Executive Board then voted to allow Bezemer a new hearing. The victim’s family will now be required to go through the painful experience again. **See Attachment 2

California Deposition Transcript Missing 55 pages of testimony (2022)

Attorney Melissa Buchman ordered the copy of a remote deposition that was noticed by opposing counsel. A digital recording was used instead of a certified stenographer. The final transcript was missing approximately 55 pages of testimony, resulting in an adverse court decision for her client. **See Attachment 3

G.M. v. C.V. (2018)

Defendant and mother C.V. appealed an order that denied her the dissolution of a final restraining order (FRO) that was originally granted against her by her former husband in 2004. The trial court denied the motion to dissolve the FRO because it did not include a transcript of the initial 2004 FRO hearing—the proceeding was recorded using audio equipment, in which the audio record of that proceeding was not capable of transcription. **See Attachment 4

State v. Yates (2018)

In this case involving convictions for kidnapping, communicating threats, assaults, breaking or entering, rape, and sexual assault, the court held that because a recording equipment malfunction prevented the court reporter from producing a full transcript of the trial, including crucial portions of the victim's testimony such as cross-examination, the defendant is entitled to a new trial. **See Attachment 5

City of Bothell v. Diane Wu (2017)

Defendant was tried on fourth-degree assault in Bothell, Washington. At the close of the trial, it was discovered that the case was not recorded. The court ruled that the defendant was entitled to a new trial, but she was forced to sell her business to cover the additional expense. **See Attachment 6

Declaration of Peter J. Eglick (2019)

Digital "reporter" unable to read or play back testimony. **See Attachment 7

ATTACHMENT 1 - State of Wisconsin v. Darrell E. Brooks (2022)

Facts: Defendant Darrell Brooks was convicted of 6 counts of first-degree intentional homicide and 61 counts of recklessly endangering safety with the use of a dangerous weapon for driving into attendees at a Christmas parade in Waukesha, Wisconsin, in which he killed 6 individuals and injured 62 additional individuals. Sixteen days prior to the fatal incident, the defendant was arrested and accused of driving into the mother of his child; however, following the arrest, the defendant was released early on bail. When the Milwaukee County Court was asked to provide the verbatim transcript of the bail hearing to determine why the defendant was released on bail prior to committing the mass tragedy, the Court noted that it could not provide the transcript of the hearing due to a technical malfunction. As a result of the audio equipment's failure to properly record the transcript, the Court was unable to determine whether it acted reasonably in releasing the defendant on bail prior to his commission of the murders.

Result: If the court system relied on a certified shorthand reporter, rather than audio equipment in this instance, a verbatim record of the bail hearing would have been created and preserved in writing. Thus, allowing the Court and the public to determine whether the defendant was reasonably released on bail or whether the Court failed in its duty to protect the public from Defendant Brooks.

Complaint: <https://www.waukeshacounty.gov/globalassets/circuit-courts/2021cf001848-comp7347101.pdf>

ATTACHMENT 2 - Parole Hearing of Daniel Bezemer (2022)

Facts: Daniel Bezemer was sentenced to 25 years in prison for the murder of his girlfriend in 2003. In August of 2022, he was up for parole, and a hearing was held on August 10, 2022. At his parole hearing, he was denied parole for the next three years. However, it was discovered that there was no record made of the hearing. Citing "procedural error," the California Executive Board of the Board of Parole Hearings voted to grant Bezemer a new parole hearing. The decision was made despite strong opposition from both the Placer County District Attorney's Office and the victim's family.

Results: Due to the Board of Parole Hearing's reliance on recording devices, there is no record of a hearing in a high-profile case. The decision to hold a new hearing forces the family of the victim to relive their experience once again. Had a certified stenographic reporter been present, the record would have been preserved, and the additional cost and trauma of a new hearing would have been avoided.

More Information: <https://www.placer.ca.gov/8328/CDCR-votes-to-give-Justine-Vanderschoots>
ATTACHMENT 3 - California Deposition Transcript Missing 55 pages of testimony (2022)

Facts: This case involved a deposition in preparation for trial on a request for a Domestic Violence Restraining Order (DRVO) in California. The deposition of the plaintiff was taken, and the transcript subsequently ordered by the plaintiff's counsel. Immediately upon receipt of the transcript, both counsel and her client realized there were glaring omissions. At one point, it appeared the plaintiff witness had admitted to some damaging allegations, when in fact, the answer that followed the question in the transcript was misleading because this was the exact spot where the gap existed.

The inaccurate transcript was offered and accepted at trial, but the trial was then for continued for three months. During that time, the witness continued to pursue all options to correct the errors and omissions in the transcript. Finally, six days before the trial resumed, the court reporting firm finally admitted that the transcript was incomplete. There were 55 pages of testimony missing.

Result: Because of the respect professional court reporters have earned in the judicial system, the initial allegation of the missing testimony left a bad impression on the court, who likely presumed the transcript was prepared by a Certified Shorthand Reporter, undermining the witness' credibility. The court refused to strike the erroneous transcript from the record and declined the DRVO request. If a certified stenographic reporter had attended the deposition, they would have been responsible for review and certification of the final transcript, and such an omission would not have occurred. This litigant suffered severe adverse consequences because of the lack of a certified stenographic reporter.

More Information:<https://www.dailyjournal.com/articles/366920-make-sure-your-court-reporter-is-really-a-court-reporter>

ATTACHMENT 4 – G.M.v C.V. (2018)

G.M. v. C.V. (2018)

Facts: In this case, Defendant and mother C.V. appealed an order that denied her the dissolution of a final restraining order (FRO) that was originally granted against her by her former husband in 2004. The trial court denied the motion to dissolve the FRO because it did not include a transcript of the initial 2004 FRO hearing—the proceeding was recorded using audio equipment, in which the audio record of that proceeding was not capable of transcription. The Superior Court of New Jersey, Appellate Division, reversed and remanded the case to the trial court with instructions that the defendant reconstruct the original record of the 2004 proceeding.

Result: Here, the Court directly denied the defendant mother justice due to preventable procedural measures by using faulty audio equipment to preserve the 2004 FRO record rather than a certified shorthand reporter. If the services of a certified stenographic reporter were used, the mother would not have been required to expend unnecessary resources to attempt to recreate a record from 14 years prior that the court specifically noted was incapable of being transcribed.

Decision: <https://law.justia.com/cases/new-jersey/appellate-division-published/2018/a4820-15.html>

ATTACHMENT 5 – State v. Yates - No. COA18-158

Facts: This case involved convictions for multiple crimes, including rape and sexual assault. On appeal, the defendant cited the lack of a complete record due to important testimony and arguments not being recorded, including the victim's cross-examination. Attempts to recreate the record were unsuccessful. Defendant's counsel argued that the incomplete transcript denied his client meaningful appellate review.

Result: The appellate court agreed that the defendant was denied a meaningful appeal due to the incomplete transcript and ordered a new trial. Aside from the additional costs involved for the taxpayers, the alleged victim will now be forced to go through the trauma of a second trial. The presence of a stenographic reporter at the trial would have ensured a complete record for appeal. In an interview with WRAL News, the defendant's counsel, Mark Hayes, said that incomplete transcripts are common and a huge problem for attorneys. Even though he benefited from this ruling, he also said that "It has bitten me many more times than it has favored me."

More Information: <https://www.wral.com/rape-victim-has-to-endure-attacker-s-second-trial-because-of-problem-traced-to-cuts-in-state-budget-/17940676/>

<https://appealsattorney.net/winning-appeal-state-v-yates/>

<https://www.sog.unc.edu/sccc/cases/state-v-yates>

ATTACHMENT 6 - City of Bothell v. Diane Wu (2017)

City of Bothell v. Diane Wu (2017)

Facts: Defendant Diane Wu was charged and tried on fourth-degree assault, a misdemeanor. At the close of the trial, it was discovered by court staff that the case was not recorded, and an audio file of the case was not documented due to an installation error in the audio equipment; Bothell Municipal Court staff rely on audio recordings to provide a record of the proceeding rather than a certified stenographer.

Because of the installation error in the recording system, which malfunctioned for 10 days prior to being detected, the Court ordered a mistrial in the case and ruled that the defendant was entitled to a new trial.

Result: Due to the Bothell Municipal Court's reliance on a malfunctioning recording system to provide the court record, the parties experienced undue delay, justice was unnecessarily prolonged, and city taxpayer dollars were needlessly wasted on additional proceedings. Furthermore, if the Court relied on a certified shorthand reporter to provide an accurate record, additional hearings and a second trial would not have been required; because of the time and expensive legal costs involved in a second trial, the defendant was also forced to sell her business to cover the legal expenses.

Article Concerning Case: <https://www.bothell-reporter.com/news/double-jeopardy-lack-of-bothell-court-recording-leads-to-mistrial-conviction-reversal/>

ATTACHMENT 7 – DECLARATION OF PETER EGLICK (2018)

Facts: This declaration was filed in response to a motion to permit non-stenographic recording of deposition, filed on April 7, 2021, in the Superior Court of Washington for Pierce County. Attorney Eglick's declaration outlined his experience with a non-stenographic reporter who was sent to cover a deposition he was defending. Attorney Eglick reluctantly agreed to continue the proceedings since all the parties were there and ready to proceed. However, the digital operator was unable to read back or even play back testimony.

Results: The deposition cited in Attorney Eglick's declaration had to be suspended until such time as a stenographic court reporter could arrive. This resulted in additional time, expense, and inconvenience for all involved. A certified and properly licensed stenographic reporter would have easily been able to accommodate requests to read back testimony.

The court denied the motion to use StoryCloud (now out of business) and stenographic reporters were used for the remainder of the case.

More Information: Superior Court of the State of Washington for Pierce County –
Case No. 20-2-07549-9
Defendants' Response to Motion to Permit Non-Stenographic Recording of
Deposition - Available by Public Records Request

ATTACHMENT 8 - State of Washington v. Jason D. Waits (2020)

Facts: In August 2020, Petitioner Jason Waits was tried and convicted of first degree child molestation and first degree attempted child molestation. The issues for the Washington Supreme Court's review arose from the bad acoustics of the building where the trial took place: a former church that was used to accommodate social distancing during the height of the COVID-19 pandemic.

Over the course of Waits' two-day trial, the transcription contained over 2,000 "inaudible" notations from the judge, lawyer, jurors, and witnesses. The transcriptionist was later able to fill in some of the gaps, but about 1,500 inaudibles remained.

Results: After Waits was convicted, he was found indigent and appointed appellate counsel. Appellate counsel asked the Court of Appeals to remand Waits' case to the trial court to attempt reconstruction of the record and to bifurcate Waits' already-identified speedy trial claim. The Court of Appeals' commissioner denied the motion and stayed the appeal, concluding that the RAPs direct the trial court and parties in the proper mechanism to reconstruct the record.

Appealing to the Supreme Court, Waits objected to the Court of Appeals' reconstruction procedure. The Supreme Court reversed the Court of Appeals and remanded to the trial court for further proceedings. "Because criminal defendants have the constitutional right to an appeal from a record that is sufficiently complete to permit effective appellate review, when that record is deficient, missing, or incomplete, the State is responsible for reconstructing it with the assistance of the parties."

A certified stenographic reporter would have immediately stopped the proceedings if they were unable to hear the testimony, thereby ensuring a complete record.

ATTACHMENT 9 – South Carolina v. Alex Murdaugh

Facts: This is a very high profile case resulting in the trial being televised on The Law & Crime Network. Defendant Murdaugh has been charged with murdering his wife and one son, with a possible penalty of life in prison without parole. On February 8, 2023, the presiding trial judge, Clifton Newman, brought up an issue of a rough draft transcript that had been ordered by defense counsel. The transcript was provided by digital recording company FTR (For the Record.) Counsel confirmed that the draft was of such poor quality it was “of little use” and a “deficit [sic] product,” despite having paid \$450 for the transcript. The judge and counsel emphasized that this was a failure of the digital company, and that the official stenographic court reporters were not responsible.

Results: All parties deserve a fair trial, and that means having timely access to appropriate transcripts and documents in order to prepare their own cases. This is especially important in criminal trials when someone’s life or liberty is at stake. By relying on inferior digital recording instead of the professional skills and technology of a stenographic reporter, the parties were denied the ability to review the testimony to assist in preparation, which may affect the outcome of the case.

A stenographic reporter could have delivered an accurate and timely rough draft, ensuring counsel’s ability to use all the appropriate tools in trying their case.

Video of Courtroom Discussion: <https://www.youtube.com/watch?v=-QhIQOPLwHw>

ATTACHMENT 10

Facts: Defendant McGervey was charged with aggravated menacing and disorderly conduct. She was convicted of aggravated disorderly conduct. She completed a court-ordered mental health evaluation, and the aggravated menacing charged was dismissed at that time. The defendant attempted to file an appeal on the remaining charge. At that time, it was found that the court’s audio recording system was not turned on until the prosecution’s cross-examination was underway; therefore, there was no record of most of the trial.

As stated in the Court’s opinion, “McGervey alleged that she could not cure the defects in the missing transcript by preparing a statement of the evidence pursuant to App.R. 9(C) due to (1) trial counsel’s limited recollection of the bench trial, and (2) health-related issues that have impaired her own recollection of the trial. The motion was supported by the affidavit of the court reporter who averred that he was “unable to produce the [entire] transcript because the ER (electronic recording) for [December 14, 2020] could not be located on the network server.” The court reporter explained that “a review of the Jefferson Audio/Video Systems (JAVS), indicate[d] that the recording system was not turned on until 1:14:31 p.m.”

Results:

The appellate court found that “meaningful appellate review cannot be achieved in this case given the magnitude of the missing record, and ordered a new trial.

Reliance on an electronic recording system is unreliable when the record of legal proceedings is found to be non-existent because of something as simple as failure to turn on a machine. The presence of a stenographic reporter, who monitors and memorializes proceedings in real time, would have ensured an accurate and timely record from which to appeal. Instead, the parties and the court system are further burdened with the expense and time of conducting a new trial.

Cite: Cleveland v. McGervey, 2022-Ohio-3911.1