IN THE SUPREME COURT OF FLORIDA

In re: Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure – Implementation of the Commission on Trial Court Performance and Accountability Recommendations

SC 08-1658

_____/

COMMENTS OF THE CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT IN SUPPORT OF THE RECOMMENDATIONS OF THE COMMISSION ON TRIAL COURT PERFORMANCE AND ACCOUNTABILITY

Comes Now Robert J. Morris, Jr., Chief Judge of the Sixth Judicial Circuit, by and through the undersigned counsel, and files these comments in response to proposed amendments to Rules of Judicial Administration 2.420 and 2.535 and in response to comments filed regarding those proposed rule amendments. The Commission on Trial Court Performance and Accountability filed a proposal relating to court reporting in the trial courts, primarily to address issues related to electronic recording of court proceedings. That proposal and the proposed amendments to Rules of Judicial Administration 2.420 and 2.535 offered by the Rules of Judicial Administration Committee are consistent with the procedures used in the Sixth Judicial Circuit.

The Chief Judge is faced with questions about access to the electronic recording of court proceedings on a regular basis. The Chief Judge submits as Appendix A, his brief that was previously filed in the case of *Media General Operations, Inc. vs. State of Florida and Alexander Robles,* 2D08-1154 (case pending in the Second District Court of Appeal) in which the petitioner filed a public records request seeking the electronic recording of a court proceeding. This brief addresses the legal issues raised by individuals and organizations that filed comments and articulates the position of the Chief Judge of the Sixth Judicial Circuit on these issues.

Should the Court grant the requests for oral argument, the Sixth Circuit requests participation in oral argument.

Respectfully submitted, this 24th day of November, 2008.

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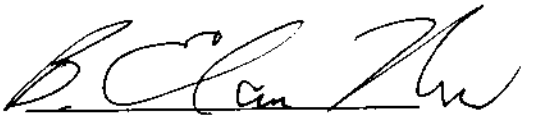
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the font requirements of Rule of Appellate Procedure 9.100(*l*).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of these comments were served by U.S. mail on Scott Dimond, Chair of the Rules of Judicial Administration Committee, Dimond, Kaplan & Rothstein, P.A., 2665 S. Bayshore Dr. PH-2B, Miami, FL. 33133-5448; John S. Mills, Chair, Appellate Court Rules Committee, Mills, Creed & Gowdy, P.A., 865 May St., Jacksonville, FL 32204-3310; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-6584; The Honorable Robert B. Bennett, Chair, Commission on Trial Court Performance and Accountability, 2002 Ringling Boulevard, Floor 8, Sarasota, FL 34237-7002; Laura Rush, General Counsel, Office of the State Courts Administrator, 500 S. Duval St. Tallahassee, FL 32399; Robert Dewitt Trammell, Florida Public Defender Association, Inc., P. O. Box 1799 Tallahassee, FL 32302; Barbara A. Peterson and Adria E. Harper, First Amendment Foundation, 336 East College Avenue, Suite 101, Tallahassee, FL 32301; Rachel E. Fugate and Gregg D. Thomas, Thomas and Locicero, 400 N. Ashley Dr. Suite 1100, Tampa, FL 33602; Jennifer Gaul, and Susan D. Wasilewski, Florida Court Reporters Association and the Florida Coalition on Court Reporter Certification, 222 S. Westmonte Drive, Suite 101, Altamonte Springs, FL 32714; and Mary Watson, 1817 Montague St., Lake Worth, FL 33461 this 24th day of November 2008.



B. Elaine New

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT

MEDIA GENERAL OPERATIONS, INC.,
Petitioner,
v. **CASE NO. 2D08-1154**

THE STATE OF FLORIDA AND ALEXANDER ROBLES,
Respondent.
_____/

RESPONSE OF THE CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

COMES NOW the Chief Judge of the Sixth Judicial Circuit, by and through the undersigned counsel, and files this response in opposition to the Petition for Writ of Mandamus, which seeks a writ directed to the Chief Judge ordering him to release the audio recording of court proceedings. The Chief Judge has determined in accordance with Rules of Judicial Administration 2.420(f)(2) and 2.535 that the form in which records of court proceedings will be released is a transcript of the proceedings. The Petitioner has rejected the offer of a written transcript and instead seeks an extraordinary writ from this Court compelling the Chief Judge to release the audio recording – in audio format – in contravention of the Chief Judge's authority as the records custodian to determine the form in which the record is provided and in contravention of his authority to establish a court reporting plan for the Circuit. The Petitioner does not have a clear legal right to

obtain the record in audio form and accordingly, the Petition for Writ of Mandamus should be denied.

The issues raised in this petition are not new to this Court. Since at least 2005 this Court has been faced with the appropriate use of the electronic recordings of court proceedings. See e.g., *Jenkins v. State*, 2D04-5425 (June 17, 2005) (Second DCA requested Chief Judges in the District to participate in oral argument regarding access to electronic records); *Holt v. Chief Judge of the Thirteenth Circuit,* 920 So. 2d 814 (Fla. 2d DCA 2006) (concerns about recording attorney client communications gave the Court considerable pause); *Moorman v. Hatfield*, 958 So. 2d 396 (Fla. 2d DCA 2007) (expressing concerns about errors in transcripts of electronic proceedings); *Williams v. State,* 2D07-6036 (March 12, 2008) (petition for writ of mandamus by DOC inmate for electronic recording denied). These cases addressed issues about the use of audio recordings instead of a transcript. This case, like *Williams*, presents the opposite issue to the Court: here the Petitioner is seeking release of the audio instead of a transcript.

BASIS FOR JURISDICTION

Pursuant to this Court's order of March 27, 2008, the Chief Judge of the Sixth Judicial Circuit or his designee have been directed to respond to the Petition. Rule of Appellate Procedure 9.100(e)(3), also gives a judge or lower tribunal the discretion to file a response to the petition for a writ of mandamus. This action

was brought pursuant to Rule of Judicial Administration 2.420(e) challenging the Chief Judge's decision to release a record of the judicial branch in the form of a written transcript instead of in the form of an audio recording. The decision of the Chief Judge in his role as records custodian is the basis for this Petition and accordingly it is appropriate that the interests of the Chief Judge be considered by this Court. If the Court issued a writ requiring the Chief Judge to release the record in audio form it would substantially impact the operations of the Sixth Judicial Circuit.

STATEMENT OF FACTS

The Chief Judge adopts the statement of facts presented by the Petitioner with the following additions. In both letters to the Petitioner, the Chief Judge has offered the Petitioner a transcript of the court proceedings in accordance with the provisions of the court reporting plan for the Sixth Judicial Circuit. (Petitioner's Appendix at Tab D, and Petitioner's Appendix at Tab F). Further, the Chief Judge offered the Petitioner an opportunity to explain why the written transcript was inadequate for the Petitioner's purposes so that the Chief Judge could exercise his discretion to determine the form in which the record would be provided. (Petitioner's Appendix at Tab D). The Petitioner replied that the audio would provide "tone and emphasis" for its newsgathering purposes. (Petitioner's Appendix at Tab E). The Chief Judge exercised his discretion and offered to

provide the record in the form of a written transcript. Rather than accept the written transcript, the Petitioner sought relief in this Court by way of the instant petition.

STANDARD OF REVIEW

This is an original proceeding pursuant to Rules of Appellate Procedure 9.030(b)(3) and 9.100(e), and Rule of Judicial Administration 2.420(e) in which the Petitioner seeks a writ of mandamus directed to the Chief Judge ordering him to release the audio recording of court proceedings. Although the standard of review is de novo, *Media General Convergence, Inc. v. Chief Judge of Thirteenth Judicial Circuit*, 840 So.2d 1008, 1013 (Fla. 2003), mandamus is an extraordinary writ that should only be issued to "compel public officials to perform nondiscretionary, ministerial duties to which the petitioner has a clear legal right." *Moorman v. Hatfield*, 958 So. 2d 396, 398 (Fla. 2d DCA 2007). Mandamus should only be granted when the petitioner can demonstrate a "violation of a clear legal right or the breach of an indisputable legal duty." *Rivera v. State*, 805 So. 2d 21, 22 (Fla. 2d DCA 2001).

ARGUMENT

I. THE CHIEF JUDGE MUST DETERMINE THE FORM IN WHICH A RECORD IS PROVIDED, AND HAS PROPERLY DONE SO HERE.

The Chief Judge recognizes that under Rule of Judicial Administration 2.420 the Petitioner is entitled to a transcript of the sentencing proceeding in question and has offered to provide the record of this court proceeding in the form of a written transcript. Rule 2.420 mandates that records of the judicial branch – including court records – be accessible to the public. The Chief Judge strongly supports that principle and timely responded to the Petitioner's request.

In providing access to records of court proceedings, the Chief Judge has determined that, as a general rule, these records will be provided in the form of a written transcript. His authority to make this discretionary decision is based upon Rule of Judicial Administration 2.420(f)(2). It provides:

> The custodian shall be solely responsible for providing access to records of the custodian's entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure. **The custodian shall determine the form in which the record is provided.** If the request is denied, the custodian shall state in writing the basis for the denial.

(Emphasis added). As custodian of this circuit's records, and pursuant to Rule 2.420(f)(2), the Chief Judge has determined that access to records of court proceedings will usually be provided in the form of a written transcript.

This decision is related to the Chief Judge's responsibilities under Rule of Judicial Administration 2.535(g)(3) to adopt a court reporting plan for the circuit.[1] Rule 2.535 authorizes the establishment of a circuit-wide plan for court reporting. It provides in pertinent part:

> (3) *Electronic Recording and Transcription of Proceedings Without Court Reporters.* A chief judge may enter a circuit-wide administrative order, which shall be recorded, authorizing the **electronic recording and subsequent transcription** by persons other than court reporters, of any judicial proceedings, including depositions, that are otherwise required to be reported by a court reporter. Appropriate procedures shall be prescribed in the order...

(Emphasis added). This language indicates that the audio recording is taken solely and exclusively for the purpose of later transcribing it into written form and this written form constitutes the official record in a case.[2] Under this authority, the

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[1] The Chief Judge's decision is also based upon the public policy reasons discussed in Section IV.

[2] Petitioner asserts that electronic recordings were "designed to bring the courts into the digital age and enhance accessibility and openness," and that "listening to the electronic recording goes to the heart of why it is created." (Petition p. 15). A review of the history of Rule 2.535 demonstrates otherwise. The court reporting system is centered on considerations of efficiency and economy, not accessibility. *See, e.g., In re Florida Rules of Jud. Admin. – Court Reporting*, 650 So. 2d 38, 39 (Fla. 1995). Further the Sixth Circuit Administrative Orders reveal that the Sixth Circuit was forced to modify its approach to court reporting due to the lack of contract stenographic court reporters. Electronic recording of court proceedings was not designed to implement a surveillance system in the courtroom. See Affidavit of Amy Lockhart, Respondent's Appendix at Tab A and Sixth Circuit Administrative Order 2004-018 PA/PI-CIR, http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/SubjectAO/Crtrptr/crtrptr.html.

Chief Judge has adopted Administrative Order 2007-079 PA/PI-CIR (Court Reporting Plan, Petitioner's Appendix at Tab A). Specifically, this administrative order provides:

> For all proceedings in which the Court is required to provide a record, the "official record" as used in this Administrative Order refers to the transcript of the proceedings as produced by a court reporter or transcriptionist acting under the authority of the [Administrative Office of the Courts] and filed with the Clerk of the Circuit Court. . . . **The official record does not include CDs, DVDs, tapes or any other electronic media recording of a court proceeding. . . . CDs, DVDs, tapes or other electronic media recordings of court proceedings made pursuant to the authority of the [Administrative Office of the Courts] shall not be released absent an order of the Chief Judge.** However, when an electronic recording is needed by the Court to resolve an issue before the Court, a trial judge may authorize the use of a recording upon a showing of good cause.

This administrative order complies with the requirements of Rule 2.535(g)(3).

In *Holt v. Chief Judge of the Thirteenth Judicial Circuit*, 920 So. 2d 814, 818 (Fla. 2d DCA 2006) this Court considered a challenge to the court reporting plan for the Thirteenth Judicial Circuit. This Court found that the Chief Judge of the Thirteenth Circuit did not exceed his authority in entering an administrative order providing for electronic court reporting in accordance with former Rule 2.070. Similarly, the Chief Judge in the Sixth Circuit has adopted a court reporting plan for this Circuit that is well within his authority.

In accordance with the Sixth Circuit's court reporting plan, the Chief Judge gave the Petitioner an opportunity to provide reasons why a written transcript was inadequate for the Petitioner's purposes. (Petitioner's Appendix at Tab D). In response, the Petitioner stated that it wanted the audio recording for its newsgathering purposes, including determining "tone and emphasis." (Petitioner's Appendix at Tab E). The Chief Judge determined that this did not constitute a reasonable basis for releasing the audio recording, and declined to release the record in audio form but continued to offer a written transcript. (Petitioner's Appendix at Tab F).

In accordance with Rule 2.420(f)(2) and Rule 2.535, the Chief Judge has exercised his discretion and properly determined that the form of the record to be provided to the Petitioner is a written transcript of the court proceeding. The Petitioner has failed to show that he has a clear legal right to the audio recording because determining the form in which a record is provided is a discretionary act on the part of the Chief Judge. Accordingly, the Petition for a Writ of Mandamus must be denied.

II. THE AUDIO RECORDING IS A PRECURSOR RECORD TO A WRITTEN TRANSCRIPT AND IS NOT REQUIRED TO BE PROVIDED.

The Petitioner argues that the audio recording of a court proceeding is – standing alone – a public record and the subsequent transcription of the recording creates a second public record – the written transcript. But an audio recording of a

court proceeding, made solely for the purpose of creating a written transcript pursuant to the court's court reporting plan, is merely a "precursor record."

Specifically, in *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, the Florida Supreme Court held that, under section 119.011(1), Florida Statutes, the definition of public records does not include "materials prepared as drafts or notes, which constitute mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded." 379 So. 2d 633, 640 (Fla. 1980). The Court went on to state, "Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and **tapes or notes taken by a secretary** as dictation." *Id.* at 640. (emphasis added). When the Supreme Court issued this opinion, the definition of public record in section 119.011 included **tapes**. See section 119.011(1), Fla. Stat. (1979), which provided: "public records means all documents, papers, letters, maps, books, **tapes** . . ." Nevertheless, the Supreme Court found that **tapes** or notes taken as dictation were merely precursors to public records and not, as Petitioner suggests, a separate public record.

As in *Shevin*, the audio recording in question here – which was made solely for the purpose of later creating a written transcript of the court proceeding – is akin to a rough draft or notes taken by a secretary for the purpose of later creating an official public record of the proceeding. As such, it is merely a "precursor

record" and the Petitioner does not have a clear legal right to access it.[3] This Court in *Holt v. Allen* 677 So. 2d 81 (Fla. 2d DCA 1996) also found that the audio tape of a court reporter used to later complete official transcripts of court proceedings was not a judicial record. While not relying upon the analysis that the tape was a precursor record, the Court reached the same result: the audio tape of a court reporter used to subsequently prepare the official record was not required to be disclosed.

Petitioner suggests that the audio recording is the ultimate confirmation of what transpired at the proceeding, not the transcript. (Petition, p. 10). This argument is refuted by section 90.108(2), Florida Statutes, which provides: "the report of a court reporter, when certified to by the court reporter as being a correct transcript of the testimony and proceedings in the case, **is prima facie a correct statement of such testimony and proceedings**." (emphasis added). This Court has also emphasized that the written transcript of the proceedings is necessary for appellate review, suggesting that the transcript is and should be the confirmation of what transpired in the court below. See *Moorman v. Hatfield*, 958 So. 2d 396, 400 (Fla. 2d DCA 2007) (J. Altenbernd concurring).

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[3] The Petitioner (page 9, footnote 3) suggests that *Shevin* is no longer applicable because the definition of "public record" under Chapter 119 does not parallel the definition of 'judicial record" in Rule 2.420. The definitions do parallel each other and the 2002 comments to Rule 2.420 state: "The definition of records of the judicial branch is consistent with the definition of "public records" in chapter 119, Florida Statutes."

The transcript of the proceeding is the "official record" and is the "final evidence of the knowledge to be recorded," not the audio recording. *Shevin*, 379 So. 2d at 640. The audio recording is merely the precursor to the transcript and is not required to be provided. Accordingly, the Petition for Writ of Mandamus must be denied.

III. RULES OF JUDICIAL ADMINISTRATION MUST BE READ *IN PARI MATERIA* WITH EACH OTHER AND THE CHIEF JUDGE HAS DONE SO HERE.

The Petitioner focuses only on the definition of "court records" in Rule 2.420(b) for its argument that the audio recording must be provided. The Petitioner overlooks the provisions of Rule 2.420(f)(2) and Rule 2.535. The term "court records" in Rule 2.420 must be interpreted in light of and read together with all related rules. The doctrine of *in pari materia*, which means "on the same matter," requires the courts to construe related statutes or related rules together so that they illuminate each other and are harmonized. *See McGhee v. Volusia County*, 679 So. 2d 729, 730 n. 1 (Fla. 1996). See also, *Miller v. State*, 694 So. 2d 884 (Fla. 2d DCA 1997) (Rules of Criminal Procedure must be read *in pari materia* with each other); *Moorman v. Hatfield*, 958 So. 2d 396, 401 (Fla. 2d DCA 2007) (J. Altenbernd concurring, finding that Rules of Judicial Administration must be read together with the Rules of Appellate Procedure).

The Chief Judge has and this Court should apply the doctrine of *in pari materia* to the Rules of Judicial Administration.[4] The Court is faced with two subsections in Rule 2.420 (2.420(b) and 2.420(f)(2)) and with Rule 2.535. The definition of "court record" in Rule 2.420(b) must be read together with the Chief Judge's authority to determine the form in which a record is provided in Rule 2.420(f)(2), and these provisions must be read together with the requirement in Rule 2.535 that the Chief Judge adopt a court reporting plan and make provision for electronic recording and transcription. The Chief Judge has done so and has done so in a manner that protects the right of access at the same time protecting important interests of the justice system.

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[4] The Trial Court Performance and Accountability Committee (TCPAC), a committee appointed by the Supreme Court, has considered these three Rules of Judicial Administration. In response to this Court's opinions in *Holt v. Chief Judge of the Thirteenth Judicial Circuit*, 920 So. 2d 814 (Fla. 2d DCA 2006) and *Moorman v. Hatfield*, 958 So. 2d 396 (Fla. 2d DCA 2007) the TCPAC conducted an extensive study of the issues related to court reporting in our state. The report http://www.flcourts.org/gen_public/TCPACtReportingFinalReport.pdf indicates that the Committee considered all three of these rules and recommended that the phrase "electronic records of court proceedings" within the definition of court records in Rule 2.420 be deleted. This change was recommended to make it even clearer that the Chief Judge has the discretion to determine the form in which the record of court proceedings are released. The approach adopted by the Chief Judge here is consistent with the recommendations of this Supreme Court Committee.

IV. PUBLIC POLICY CONSIDERATIONS SUPPORT THE CHIEF JUDGE'S DECISION TO RELEASE COURT PROCEEDINGS IN WRITTEN FORM.

In addition to the legal authority cited above, there are many substantial public policy considerations that support the Chief Judge's decision to release the record requested in the form of a written transcript instead of the audio recording.

A. THE USE OF WRITTEN TRANSCRIPTS PROTECTS CONFIDENTIAL COMMUNICATIONS AND THE ATTORNEY-CLIENT PRIVILEGE.

Electronically recorded court proceedings may include confidential attorney-client communications that are not part of the official record of the proceedings. Releasing the audio recording could result in disclosure of confidential communications.

In the Sixth Circuit, proceedings where the court is required to make a record are recorded by the CourtSmart™ system, except for felony trials and a few other limited exceptions. See Affidavit of Amy Lockhart, Respondent's Appendix at Tab A and Administrative Order 2007-079 PA/PI-CIR, Petitioner's Appendix at Tab A. The CourtSmart™ system is so sensitive that it will pick up conversations in the courtroom, whether such conversations are part of the court proceedings or not. Such conversations may occur before a calendar is started, in between cases on a calendar, or after the conclusion of the court proceedings. Such conversations may also occur during the court proceedings, for instance two people in the

courtroom may have a conversation that is not part of the court proceedings. None of these conversations were previously recorded by a stenographer, but they may be recorded by the electronic court reporting system. Unless an attorney and his or her client whisper softly, a communication between the attorney and the client at counsel table, which cannot be heard by the judge or others in the courtroom, may be recorded by the CourtSmart™ system. This level of sensitivity is necessary to ensure that court reporters can hear the entire court proceedings in order to produce the transcript, the purpose for which the recording is made.

The importance of the attorney-client privilege cannot be overemphasized, and is of particular importance in the context of criminal cases. In *Upjohn Co. v. U.S.*, the United States Supreme Court noted:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

449 U.S. 383, 389 (1981) (citations omitted). Due to the pace of criminal proceedings and the fact that multiple defendants are often present in the courtroom at one time, it is especially important that a criminal defendant be able to speak "fully and frankly" with his or her attorney while in the courtroom, without fear that the audio of these conversations will later be available for public

distribution. The consequences of releasing audio recordings of attorney-client communications that are incriminating in nature could be disastrous, not only for the litigant in question, but for the integrity of the entire judicial system. In the case of *Holt v. Chief Judge of the Thirteenth Judicial Circuit*, this Court acknowledged the potential for recording privileged communications and noted that the issue gave the Court "considerable pause." 920 So. 2d 814, 818 (Fla. 2d DCA 2006). This Court recommended to the Legislature and the Florida Supreme Court that steps be taken to mitigate potential problems with the electronic court reporting system. *Id.* at 818, n. 4. The Chief Judge of this circuit has done so and determined that not releasing audio recordings, except in very limited circumstances, is a reasonable method for protecting attorney-client communications and limiting the problems confronted in *Holt*.[5]

B. THE USE OF WRITTEN TRANSCRIPTS PREVENTS NON-PUBLIC RECORDS FROM BEING IMPROPERLY DISCLOSED.

Electronically recorded proceedings may include other communications that are not part of the official records of the proceedings. For example, a recording may include personal conversations before, during, or after court proceedings

[5] Furthermore, the Petitioner acknowledges (Petition p. 13, n. 8) that should the court be required to release audio recordings, it also would be required under Rule of Judicial Administration 2.420(f)(2) to review the recording prior to its release and redact any portion that is not subject to public disclosure. This process may actually be more time consuming for court staff than producing a transcript and because of multiple conversations occurring at the same time may not be practical.

between bailiffs and clerks or between private citizens sitting in the courtroom. Electronic recordings of other communications in the courtroom that are not part of the judicial proceedings before the court are not "records of the judicial branch" as that term is defined in Rule of Judicial Administration 2.420, because such communications do not constitute official business of the court. *See State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).

City of Clearwater involved a public records dispute over e-mails sent by two city employees that the employees themselves designated as personal in nature. 863 So. 2d at 150. The Florida Supreme Court approved the decision of the Second District Court of Appeal, which found that personal e-mails do not constitute public records simply because they are transmitted from or placed on a government-owned computer, as they are neither "made or received pursuant to law or ordinance" nor "created or received 'in connection with official business' or 'in connection with the transaction of official business.'" *Id.* at 151, *citing Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844, 847 (Fla. 2d DCA 2002). In reaching its holding, the Supreme Court stated, "[A]lthough digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk." *Id.* at 153.

Just as a personal e-mail is not a public record simply because it is digital in nature and sent from a public computer, a conversation in the courtroom does not become a public record simply because it is made in a courtroom and preserved in a digital format. Consequently, these types of conversations are not public record and should be protected from public disclosure. Requiring written transcripts of court proceedings that include only official court business is a reasonable means of achieving this.

C. THE USE OF WRITTEN TRANSCRIPTS MITIGATES THE POTENTIAL FOR ABUSE OF RECORDINGS INSIDE AND OUTSIDE OF COURT PROCEEDINGS.

Release of electronic recordings may invite misrepresentations to the circuit and appellate courts about the record in a case. The court system has historically used an independent, unbiased reporter of court proceedings to ensure that an accurate record is made of the proceedings. Under Rule of Judicial Administration 2.535(f), a court reporter is an officer of the court and, as such, is bound by all applicable rules, statutes, and ethical obligations. Others are not bound by the same rules and regulations.

In a concurring opinion in *Moorman v. Hatfield*, 958 So. 2d 396 (Fla. 2d DCA 2007), Judge Altenbernd addressed this issue, stating:

> If we allow rule 2.535 to override the rules of appellate procedure [with respect to the requirement that court reporters prepare transcripts], then we face a future in which criminal defendants, their family members, or others with interest in the case may seek to

> prepare and file the transcript that becomes an official part of the record on appeal. People who do not possess a high school diploma may prepare such a transcript. In a digital world, such transcriptionists may not even reside in Florida or in the western hemisphere. It may not be essential that the Florida Rules of Appellate Procedure have a valid and logical reason to require the use of court reporters for those rules to override rule 2.535(g)(3), but it is reassuring to understand the importance of using court reporters for all transcripts used in appellate proceedings.

Id. at 402. The Chief Judge of this circuit shares these concerns and has elected to release only written transcripts to the public in an attempt to mitigate the potential for problems related to audio recording of court proceedings.[6]

Release of audio recordings also may invite misuse of the recordings outside of court proceedings. A CD with an electronic recording of court proceedings can be used to publicly embarrass a witness or crime victim, or otherwise be misused. Imagine, for example, the ramifications of having the testimony of a victim of sexual battery broadcast over the Internet, or perhaps having sensitive or embarrassing testimony offered in a domestic violence proceeding similarly publicized. A requirement that records of court proceedings be provided only in a written format substantially reduces this potential for abuse. While the Chief Judge is not suggesting that this Petitioner would use an audio recording in this

[6] The Chief Judge recognizes that this Petitioner is not seeking the audio for appellate review. The potential for misrepresentations to the appellate court by others is a strong factor in the decision to generally only release a transcript.

way, if a precedent is set requiring the dissemination of audio recordings, other requestors may use the recordings for abusive purposes.

D. THE USE OF TRANSCRIPTS DOES NOT RESTRICT THE RIGHT OF THE PRESS TO ACCESS COURT PROCEEDINGS.

This Circuit's court reporting plan in no way hinders the media's access to court proceedings or diminishes the important role of the media. This Circuit's administrative order on media access – Administrative Order No. PA/PI-CIR-99-77 (Re: Electronic Media and Still Photography Coverage of Judicial Proceedings http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/aos99/AO99-77PAPI.html) – provides the press with broad access to court proceedings and imposes only limited restrictions on media coverage. Any limitations are imposed in an attempt to minimize the disruption of court proceedings and preserve the right to a fair trial. See Rule of Judicial Administration 2.450. If the Petitioner wished to determine the tone or emphasis of the sentencing proceeding in question - as it indicated was its purpose in requesting the audio recording of the sentencing proceeding – the Petitioner could have been present at the proceeding so long as it complied with Rule of Judicial Administration 2.450, Administrative Order PA/PI-CIR-99-77, and any restrictions imposed by the trial judge. An important difference in having the press report on a proceeding directly is that at the time the proceedings are taking place, the court and others are aware that the press is filming the proceeding and can respond accordingly. For example, the presiding

judge could announce to those in the courtroom that the media is recording the proceeding, thereby placing persons on clear notice that private (and possibly privileged) conversations should take place outside of the courtroom. The judge might also allow for additional breaks in the proceeding for attorneys and their clients to discuss legal matters. It simply is not feasible to do this in every case due to the volume of proceedings and multiple cases being processed in the courtroom at the same time, but this can be done in the few cases when the press is present. Also another difference is that the media's recording equipment may not be as sensitive as the CourtSmart™ system.

The Petitioner had ample opportunity to be present at the proceeding and hear the "tone and emphasis" of the sentencing hearing in question. The Chief Judge should not now be required to provide the audio, made for the purpose of creating a transcript, to the Petitioner - effectively rendering a large portion of the court reporting plan a nullity.

E. PRACTICAL CONSIDERATIONS DEMAND THAT AUDIO RECORDINGS NOT BE RELEASED TO THE PUBLIC.

In addition to the broader policy reasons for not releasing audio recordings, there are many practical considerations weighing against releasing these recordings. The recordings have been requested by DOC inmates. See, for example, *Willie S. Williams v. State of Florida*, 2D07-6036 (Mar. 12, 2008) (Court denied a petition for a writ of mandamus where the inmate sought the audio

recording of a pre-trial hearing); *Kitchen v. State*, 917 So. 2d 360 (Fla. 1st DCA 2005) (Court denied petition for writ of mandamus by prisoner seeking the audio recording of his trial). If the Petitioner is entitled to the audio recording, criminal defendants will also be entitled to the audio recording. But it is unknown whether DOC would allow inmates to take possession of an audio CD, because it could be broken and used as a weapon. Additionally, jail and prison inmates, and perhaps other indigent persons, likely will not have access to the equipment necessary to listen to, transcribe, or otherwise make use of these recordings. Once the audio recording is handed over, it will be difficult to determine what use the possessor will make of the audio, if the recording will be enhanced or altered in any way, or how accurate any transcript made of the audio will be. This is only a short list of the challenges the courts may face if required to provide audio recordings, but – candidly – there is no way to know what types (and what volume) of issues might arise.

CONCLUSION

For the reasons outlined above, the Chief Judge respectfully asserts that he has appropriately exercised his discretion to determine that the record of court proceedings should be provided in the form of a written transcript and has offered the transcript to the Petitioner. The Petitioner requests the audio recording but has failed to establish that it has a clear legal right to the audio recording. Accordingly the Petition for Writ of Mandamus should be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gregg D. Thomas, Esq, 400 N. Ashley Dr., Ste 1100, Tampa, FL 33602; The Honorable J. Marion Moorman, Public Defender, 10th Judicial Circuit, 255 N. Broadway Ave. Drawer PD, P.O. Box 9000, Bartow, FL 33831-9000; and Richard Fishkin, Esq, Office of Attorney General, Concourse Ctr 4, 3507 E. Frontage Rd., Ste 200, Tampa, FL 33607 this 15th day of April, 2008.

Certificate of Compliance

Pursuant to Rule of Appellate Procedure 9.100(*l*) I certify that this computer generated response is prepared in Times New Roman 14-point font and complies with the Rule's font requirements.

B. Elaine New