

From: masias, mindy
Sent: Wednesday, February 15, 2017 2:06 PM
To: berger, michael; marroney, gerald
Cc: eid, allison; dailey, john; stwalley, sherry
Subject: Re: Order Denying Court Reporter

Thank you for your time speaking with me, Judge Berger. Per our conversation, Sherry Stwalley has offered to provide technical assistance in the assigned subcommittee, should that eventually be needed. I have copied her here.

Mindy Masias

Chief of Staff

Colorado Judicial Department

1300 Suite #1200

Denver, CO 80203

720-625-5901

From: berger, michael
Sent: Wednesday, February 15, 2017 10:07 AM
To: marroney, gerald; masias, mindy
Cc: eid, allison; dailey, john
Subject: FW: Order Denying Court Reporter

Jerry and Mindy, I have placed this matter on the Civil Rules Committee agenda for its March 31, 2017 meeting. I have little doubt that CRCP 80 (a) needs to be amended, but the more difficult question is what an amended rule should say. Because this obviously affects the administration and budget of the Judicial Branch, I think input from your office is essential before the civil rules committee makes any recommendations to the Supreme Court. No action will be taken at the March 31 meeting, other than probably appointing a subcommittee to study the matter. I have discussed the matter with Judge Dailey, the chair of the Criminal Rules Committee, and Judge Dailey and I probably will establish a joint subcommittee. I think it will be important for a representative of SCAO to participate on that joint subcommittee.

Michael H. Berger, Chair

Civil Rules Committee

720 625-5231

Michael.berger@judicial.state.co.us

From: moore, jenny
Sent: Tuesday, February 14, 2017 12:03 PM
To: berger, michael; dailey, john
Cc: swift, pattie
Subject: FW: Order Denying Court Reporter

Hello,

Please see the email string and document attached that pertain to a proposed amendment to C.R.C.P. 80(a). Judge Dailey, I'm including you because Crim. P. 55(e) contains a reference to C.R.C.P. 80. Judge Berger, please let me know if you'd like this placed on the March 31 agenda.

Thanks,
Jenny

From: masias, mindy
Sent: Tuesday, February 14, 2017 11:31 AM
To: moore, jenny <jenny.moore@judicial.state.co.us>
Cc: swift, pattie <pattie.swift@judicial.state.co.us>
Subject: FW: Order Denying Court Reporter

Jenny,

Thank you for taking my call today. Judge Swift would like to formally request the respective rules committees to consider revision based on the the interplay between the rules of criminal procedure and the rule of civil procedure, 80(a), that says the court must provide a court reporter unless the parties stipulate otherwise. Attached is a Judge Gonzales' decision on a motion filed before the court. Clarity will be beneficial for the future.

Thank you very much for your help with this matter!

Mindy Masias

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From: "swift, pattie" <pattie.swift@judicial.state.co.us>
Date: Monday, February 13, 2017 at 5:01 PM
To: Mindy Masias <mindy.masias@judicial.state.co.us>
Cc: "gallegos, christina" <christina.gallegos@judicial.state.co.us>
Subject: FW: Order Denying Court Reporter

Hi Mindy,

Now that we have no court reporters on staff in the 12th, we repeatedly receive motions from the public defender to require us to obtain a court reporter for a jury trial. One of the bases for this motion is the interplay between the rules of criminal procedure and the rule of civil procedure, 80(a), that says the court must provide a court reporter unless the parties stipulate otherwise. Attached is an order Judge Michael Gonzales wrote that denies such a request and reviews the relevant rules and caselaw. My question to you, though, is can't the Supreme Court revise the rules of civil and criminal procedure to make clear that electronic recording is sufficient to make the record? I don't want to approach the Chief Justice with this order given that, if the defendant is convicted at trial, his case could end up in front of the Supreme Court. But I would like to raise this issue in some way. Do you have a suggestion for how to go about that?

Thanks,

Pattie P. Swift

Chief Judge – 12th Judicial District

Water Judge – Water Division 3

Alamosa County Courthouse

702 Fourth Street

Alamosa, CO 81101

719-589-4996

From: gonzales, michael

Sent: Monday, February 13, 2017 4:51 PM

To: hayes, patrick; swift, pattie; gonzales, martin

Cc: pacyga, benjamin

Subject: Order Denying Court Reporter

Fellow Judges-

I am attaching an order that Ben prepared and I issued regarding the ongoing "Demand for a Court Reporter" filed by the Public Defender.

After discussing the ongoing issue with Ben, we felt that it was appropriate to issue a written order to put the issue to rest at least for the time being; I am sure Ben would be happy to share if this order is helpful in any way. Thanks Ben.

Judge Mike

Michael A. Gonzales

District Court Judge

12th Judicial District

702 4th Street

Alamosa, CO 81101

(719) 589-7610

District Court, Alamosa County, State of Colorado Court Address: 702 Fourth Street, Alamosa, CO 81101	▲ COURT USE ONLY ▲ <hr/> Case No: 2016CR415 Division: 2
<p>THE PEOPLE OF THE STATE OF COLORADO, <i>Plaintiff,</i></p> <p>v.</p> <p>NATHANIEL FERRELL, <i>Defendant.</i></p>	
Order: Denying Demand for Court Reporter [D-11]	

THIS MATTER came before the Court on the Defendant Nathaniel Ferrell’s *Demand for Court Reporter [D-11]*, filed on February 13, 2017. In the *Demand*, the Defendant seeks an order appointing a court reporter to record the proceedings at his trial by jury. The Defendant did not file the *Demand* until two days before trial. The Defendant is represented by Deputy State Public Defender Amanda Hopkins. The People are represented by Deputy District Attorney Ashley Fetyko.

Initially, the Court concludes that the *Demand* was not timely filed. On February 6, 2017, the Court ordered the parties to file any motions in limine by February 8, 2017. The Defendant did not file this motion until February 13, 2017. The Court, therefore, denies the motion as untimely, especially in light of the difficulty of finding a court reporter on such short notice. But, the Court also denies the *Demand* on the merits.

The Colorado Rules of Criminal Procedure specify that “[t]he practice and procedure concerning reporter’s notes and electronic or mechanical recordings shall be as prescribed in Rule 80, C.R.C.P., for district courts . . .” Crim. P. 55(e). In turn, Rule 80(a) provides: “Unless the parties stipulate to the contrary, a district court . . . shall . . . direct that evidence be taken stenographically and appoint a reporter for that purpose.” The chief purpose of Rule 80(a) is ensuring, “in case of a review of the judgment, a full and complete record of the proceedings may be written out to be laid before the appellate tribunal.” *Jones v. Dist. Court*, 780 P.2d 526, 529 (Colo. 1989) (quoting *Keady v. Owers*, 30 Colo. 1, 7, 69 P. 509, 511 (1902)).

In 2000, the Chief Justice signed CJD 00-02, titled “Concerning Waiver of Application of C.R.C.P. 80(a).”¹ The directive provided:

Colorado Rule of Civil Procedure 80(a), insofar as it requires that evidence be taken stenographically for proceedings in the district

¹ CJD 2000-02, available at https://www.courts.state.co.us/Courts/Supreme_Court/Directives/00-02.pdf.

court, is waived for proceedings conducted by any district or county judge assigned to hear a district court case when the Chief Judge of the district determines that such a waiver is necessitated by exigent circumstances, such as the unavailability of a court reporter.

The Chief Judge for the Twelfth Judicial District has issued CJA0 2003-09, as amended,² which provides:

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- B. C.R.C.P. 80(a) notwithstanding, Chief Justice Directive (CJD) 2000-02 authorizes the chief judge of each judicial district to waive the requirements of C.R.C.P. 80(a) and permit the use of electronic recording devices as necessary when a court reporter is unavailable.
 - C. The Twelfth Judicial District does not currently employ any court reporters.
 - D. Until the Twelfth Judicial District is able to hire one or more court reporters, it will be necessary to electronically record proceedings before the district court.

(emphasis added). Because it is necessary to electronically record proceedings before the district court in the Twelfth Judicial District, the Court denies the *Demand*.

Despite CJD 2000-02 and CJA0 2003-09, the Defendant argues that the court must provide a court reporter unless he stipulates to the contrary. He contends that the CJD and CJA0 serve to “prevent a litigant from having a full and complete record of the proceedings so as to protect his or her right to an appeal do not promote the efficient function of the Court” Motion [D-11], at ¶ 5. The Court disagrees. These authorities allow the Court to rely on electronic recording instead of a live court reporter. The Court has used its electronic recording devices and transcriptionists to prepare transcripts for appeal.³ The Defendant has not explained how using this process would prejudice him. Indeed, this process will produce a full and complete record for appeal with the same content as if it were created by a live court reporter. Thus, the Court’s use of electronic recording fully satisfies Rule 80(a)’s purpose of providing “a full and complete record” for any appeal. *See Jones*, 780 P.2d at 529.

The Defendant also argues that “Chief Justice Directives are policy statements, not statutes.” Motion [D-11], at ¶ 6. The Court agrees that a Chief Justice Directive is not a statute. But, such directives are binding on the courts. Chief Justice Directives flow from the Chief Justice’s “administrative authority” as “the executive head of the Judicial Branch.” *People ex rel. D.L.C.*, 70 P.3d 584, 587 (Colo. App. 2003); Colo. Const. art. VI, §§ 2, 5(2). As a result, “Chief

² CJA0 2003-09 as amended, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/12th_Judicial_District/Chief%20Judge%20Administrative%20Orders/2003-09%20-%20Making%20a%20Record%20in%20District%20court%20rev%201-9-2017.pdf

³ *See* 12th Judicial District, Transcript Ordering Policy, *available at* https://www.courts.state.co.us/userfiles/file/Court_Probation/12th_Judicial_District/Transcripts/12th%20JUDICIAL%20DISTRICT%20Transcript%20policy%201-17.docx.

Justice directives are an expression of Judicial Branch policy and are to be given full force and effect in matters of court administration.” *Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007) (emphasis added); *People v. Cardenas*, 62 P.3d 621, 623 (Colo. 2002); *People v. Schupper*, 2014 COA 80M, ¶ 24, 353 P.3d 880, 888; *People v. Orozco*, 210 P.3d 472, 475 (Colo. App. 2009). Such matters of administration are directly tied to the use of electronic recording devices instead of court reporters. For instance, a court reporter will be available only if there is funding to pay court reporters and court reporters can be assigned to district court trials. *Cf. Yeager v. Quinn*, 767 P.2d 766, 769 (Colo. App. 1988) (concluding that Chief Justice Directive could require county court to use electronic recording devices instead of court reporters, even though statute gave county court judges discretion to use either). Thus, the Chief Justice, as executive head of the Judicial Branch, has authority to create an exception to Rule 80(a) when it is administratively impossible to comply with it — that is, when there are exigent circumstances, such as the unavailability of a court reporter. And, the CJAO merely clarifies how that directive applies in the Twelfth Judicial District.

The Defendant’s reliance on *Jones* is misplaced. As relevant here, the trial court in *Jones* ruled that it would not record certain aspects of a trial — including bench or side-bar conferences. 780 P.2d at 530. The trial court indicated that it would allow parties to make a record of these proceedings at a more convenient time. *Id.* at 527. The Colorado Supreme Court held that “absent the consent of the parties, Colorado law requires that trial proceedings be recorded contemporaneously by the court reporter.” *Id.* But, the Colorado Supreme Court did not consider the use of contemporaneous electronic recording as an alternative to court reporters; instead, the court focused on making a complete and contemporaneous record. Therefore, *Jones* does not require the court to use a live court reporter instead of its electronic recording system.

The Defendant also argues that the use of electronic recording devices instead of court reporters would violate the Defendant’s constitutional right to due process of law. None of the cases cited by Defendant support this conclusion. *See Jones*, 780 P.2d at 528-30 (citing procedural rules and constitutional provision specifying that district courts are courts of record); *Herren v. People*, 147 Colo. 442, 444, 363 P.2d 1044, 1046 (1961) (similar). The Court has reviewed other cases addressing the use of court reporters. *See, e.g., Norton v. Norton*, 494 P.2d 847 (Colo. App. 1972); *Pacheco v. People*, 146 Colo. 200, 360 P.2d 975 (1961); *Schleiger v. Schleiger*, 137 Colo. 279, 324 P.2d 370 (1958). And, the Court has not found any cases supporting this conclusion and concludes that, at least in the absence of demonstrated prejudice to the defendant, the use of electronic recording devices is not a due process violation.

Finally, the Defendant appears to imply that Rule 80(a) contradicts CJD 00-02 and CJA0 03-09. The Court disagrees. When the rationale of a legal rule no longer applies, that rule itself no longer applies. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). The rationale for Rule 80(a) is ensuring “a full and complete record” for any appeal. *See Jones*, 780 P.2d at 529. This rationale does not provide any basis for distinguishing between the use of electronic recording devices and the use of live court reporters. And, this rationale does not require the use of live court reporters when exigent circumstances — such as the unavailability of a court reporter — make it onerous to comply with it. Here, the Defendant waited until two days before trial to demand a court reporter. It would be onerous for the Court to secure one at this time and, if the

Court did so, it would not further the rationale of ensuring “a full and complete record” for any appeal.

IT IS THEREFORE ORDERED THAT the Defendant’s *Demand for Court Reporter [D-11]*, filed on February 13, 2017, is Hereby DENIED.

Issue Date: 2/13/2017

BY THE COURT:

Michael A. Gonzales
District Court Judge