

Memorandum 2002-16

SB 1371 (Morrow): Cases in Which Court Reporter Is Required

SB 1371 (Morrow) would implement the Commission's recommendation on *Cases in Which Court Reporter Is Required* (November 2001). The bill is pending in the Senate Judiciary Committee, but we are not yet sure when it will be heard. The California Court Reporters Association ("CCRA") supports the bill, although the group has also requested an amendment (see attached letter). We are not aware of any formal opposition at this time. A number of points warrant discussion.

CONCERNS OF ED KUWATCH REGARDING PENAL CODE SECTION 1539

At the suggestion of Judge Dennis Murray of the Tehama County Superior Court, SB 1371 would amend Penal Code Section 1539 to reflect trial court unification:

Penal Code § 1539 (amended). Transcript of special hearing

SEC. 7. Section 1539 of the Penal Code is amended to read:

1539. (a) If a special hearing be held in ~~the superior court~~ a felony case pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against ~~him~~ the defendant; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe ~~his~~ the reporter's shorthand notes pursuant to this section if any party to a special hearing in ~~the superior court~~ a felony case files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of

Section 869. In every case in which a transcript is filed as provided in this section, the county clerk of the court shall deliver the original of such transcript so filed ~~with him~~ to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand by ~~him~~ without cost to ~~him~~ the defendant.

(c) Upon a motion by a defendant pursuant to this chapter, the defendant shall be entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause.

Comment. Section 1539 is amended to make clear that it applies only to a special hearing in a felony case pursuant to Section 1538.5. This implements the principle that trial court unification did not change the extent to which court reporter services or electronic reporting is used in the courts. 1998 Cal. Stat. ch. 931, § 507; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998); see also 1997 Cal. Stat. ch. 279, § 3 (former Section 1538.5(g), (i)).

As before unification, Section 1539 does not address whether shorthand or other verbatim reporting is required at a special hearing in a misdemeanor case pursuant to the state or federal Constitution or some other provision of law. For discussion of the extent to which a defendant is entitled to a verbatim record at public expense in a misdemeanor case, see *In re Armstrong*, 126 Cal. App. 3d 565, 574, 178 Cal. Rptr. 902 (1981) (on request, all misdemeanor defendants are constitutionally entitled to verbatim record at public expense); but see *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (nothing in state or federal Constitution requires free verbatim record in misdemeanor case on request without showing of indigency).

Section 1539 is also amended to reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See Gov't Code §§ 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

In the course of the Commission's study, Ed Kuwatch of the California Deuce Defenders raised concerns regarding an earlier draft of this amendment. He maintains that all criminal defendants are constitutionally entitled to a free verbatim record on request. First Supplement to Memorandum 2000-81, pp. 2-5

& Exhibit p. 2; Memorandum 2001-89, pp. 6-9 & Exhibit p. 4. In his view, the earlier draft did not comply with this requirement. Memorandum 2001-89, Exhibit p. 4. He apparently interpreted the draft to imply that a defendant is not entitled to shorthand reporting of a special hearing in a misdemeanor case.

In a memorandum for the Commission, the staff pointed out that the proposed amendment did not say as much, nor was it intended to imply anything, one way or another, regarding whether a defendant is entitled to shorthand reporting of a special hearing in a misdemeanor case pursuant to the state or federal Constitution or other provision of law. Rather, the proposed amendment was just intended to make clear that as before unification, Penal Code Section 1539 only applies to a special hearing in a felony case. Memorandum 2001-89, p. 8. The staff suggested adding the following language to the statute to make the intent more clear:

(d) Nothing in this section implies that a defendant is or is not entitled to shorthand or other verbatim reporting of a special hearing in a misdemeanor case pursuant to the United States Constitution, California Constitution, or other provision of law.

Id. The staff also pointed out that the proposal already included a provision underscoring the nonsubstantive nature of the reforms: “Nothing in this act is intended to change the extent to which official reporter services or electronic reporting may be used in the courts.” *Id.*

The Commission decided to add language to the Comment instead of to the statute:

As before unification, Section 1539 does not address whether shorthand or other verbatim reporting is required at a special hearing in a misdemeanor case pursuant to the state or federal Constitution or some other provision of law. For discussion of the extent to which a defendant is entitled to a verbatim record at public expense in a misdemeanor case, see *In re Armstrong*, 126 Cal. App. 3d 565, 574, 178 Cal. Rptr. 902 (1981) (on request, all misdemeanor defendants are constitutionally entitled to verbatim record at public expense); but see *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (nothing in state or federal Constitution requires free verbatim record in misdemeanor case on request without showing of indigency).

Minutes (Nov. 15-16, 2001), pp. 8-9.

After the Commission finalized its proposal, the staff received an email message from Mr. Kuwatch noting that in *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988), the California Supreme Court

says that misdemeanor defendants ARE entitled to a verbatim transcript of the proceedings. That could be a tape recording or it could be a shorthand reporter. But the fact remains that misdemeanor defendants are in fact entitled to a verbatim transcript of the proceedings according to the California Supreme Court. Your bit of legislation goes directly against the ruling of the California Supreme Court, and it is wrong.

Email from Ed Kuwatch to Barbara Gaal (2/12/02).

The staff responded, explaining that *Ryan* did not construe Penal Code Section 1539 or any other statute relating to court reporting, and that the Commission's proposal was not intended to take any position regarding constitutional requirements relating to court reporting, electronic recording, verbatim transcripts, or the like. Email from Barbara Gaal to Ed Kuwatch (3/7/02). The staff also pointed out that the proper interpretation of *Ryan* was not unambiguous:

In *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988), the California Supreme Court considered whether a municipal court judge should be removed from office for committing acts of misconduct. The Court upheld the removal on various grounds, including "failure to instruct defendants appearing in propria persona that they had a right to a verbatim record." *Id.* The Court referred favorably to *In re Armstrong*, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1981), and stated that the "judge's stubborn and obstructionist attitude effectively denied those defendants their constitutional right to have a reporter present." *Ryan*, 45 Cal. 3d at 541-42.

But the Court did not refer to *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 192 Cal. Rptr. 341 (1983), discuss the substance of the conflict between *Armstrong* and *Andrus*, or disclose whether any of the defendants in question was a non-indigent misdemeanor defendant. Whether *Ryan* can be said to have resolved the conflict between *Armstrong* and *Andrus* is debatable.

Id. The staff acknowledged that perhaps the Comment to Penal Code Section 1539 should refer to *Ryan*. The staff also offered to suggest that the Commission re-consider the possibility of adding language to the statute clarifying that the

provision is not intended to address whether verbatim reporting of a special hearing in a misdemeanor case is constitutionally required. *Id.*

Mr. Kuwatch replied by reiterating that misdemeanor defendants are entitled to a verbatim transcript in all misdemeanor cases. Email from Ed Kuwatch to Barbara Gaal (3/11/02). “The California Supreme Court has clearly expressed this fact in *Ryan*.” *Id.* Mr. Kuwatch relies on the portion of *Ryan* in which the court states that the “court administrator for Placer County advised all members of the court, including Judge Ryan, of the case of *In re Armstrong* (1981) 126 Cal.App.3d 565 [178 Cal. Rptr. 902], which held that it is a violation of due process and equal protection to deny a verbatim record upon request in all municipal court proceedings.” 45 Cal. 3d at 541.

The staff continues to feel that it would be a mistake to take a position on the proper interpretation of *Ryan*. *Armstrong* clearly holds that “a misdemeanor defendant, upon his request, is constitutionally entitled to a verbatim ‘record of sufficient completeness’ permitting proper consideration of an appeal which might thereafter be taken.” 126 Cal. App. 3d at 575. *Andrus* just as clearly holds that “[n]othing in the Constitutions of the United States or California requires a free verbatim record in misdemeanor cases on request without a showing of indigency.” 143 Cal. App. 3d at 1050. Whether the Supreme Court resolved this conflict in *Ryan* without even citing *Andrus* is hardly clear-cut. The Commission should continue to avoid taking a stance on the issue.

Perhaps the best means of accomplishing this would be to refer to all three cases (*Ryan*, *Andrus*, and *Armstrong*) in the Comment to Penal Code Section 1539, *without parentheticals*, and let the cases speak for themselves. It might also be helpful to add subdivision (d) along the lines previously proposed, although the staff does not feel strongly about this. Thus, **the amendment would read:**

Penal Code § 1539 (amended). Transcript of special hearing

SEC. __. Section 1539 of the Penal Code is amended to read:

1539. (a) If a special hearing be held in ~~the superior court~~ a felony case pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against ~~him~~ the defendant; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of

each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe ~~his~~ the reporter's shorthand notes pursuant to this section if any party to a special hearing in the superior court a felony case files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the ~~county~~ clerk of the court shall deliver the original of such transcript so filed ~~with him~~ to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand ~~by him~~ without cost to ~~him~~ the defendant.

(c) Upon a motion by a defendant pursuant to this chapter, the defendant shall be entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause.

(d) Nothing in this section affects the extent to which a defendant may be entitled to shorthand or other verbatim reporting of a special hearing in a misdemeanor case pursuant to the United States Constitution, California Constitution, or other provision of law.

Comment. Section 1539 is amended to make clear that it applies only to a special hearing in a felony case pursuant to Section 1538.5. This implements the principle that trial court unification did not change the extent to which court reporter services or electronic reporting is used in the courts. 1998 Cal. Stat. ch. 931, § 507; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998); see also 1997 Cal. Stat. ch. 279, § 3 (former Section 1538.5(g), (i)).

Section 1539 is also amended to reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See Gov't Code §§ 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

Subdivision (d) is added to make clear that Section 1539 does not address whether shorthand or other verbatim reporting is required at a special hearing in a misdemeanor case pursuant to the state or federal Constitution or some other provision of law. For

discussion of the extent to which a defendant is entitled to a verbatim record at public expense in a misdemeanor case, see *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983); *In re Armstrong*, 126 Cal. App. 3d 565, 574, 178 Cal. Rptr. 902 (1981).

The staff will raise this possibility with Mr. Kuwatch and report back to the Commission regarding his response.

OTHER ISSUES

Concerns of Contra Costa County Superior Court

We received an email message from the Contra Costa County Superior Court, which appears to refer to the proposal on *Cases in Which Court Reporter Is Required*, but does not clearly state as much. The message states:

The change recommended would have the effect of mandating reporting of infraction proceedings which are not required to be reported now. Similarly, the clause that provides the option in misdemeanor cases to use electronic recording when a court reporter is unavailable has the same effect. Contra Costa opposes these changes. They effectively become new mandates, but are unfunded. And there would definitely be cost impacts from these changes.

Email from Sherry Dorfman to Nat Sterling (2/22/02).

These concerns appear to be unfounded. Code of Civil Procedure Section 274c already mandates reporting of infraction proceedings under specified circumstances. SB 1371 would merely relocate Section 274c with clarifying revisions to Code of Civil Procedure Section 269. The bill would not revise the law with regard to reporting of infraction proceedings.

Further, SB 1371 would not revise Government Code Section 72194.5, which permits electronic recording of a limited civil case or a misdemeanor or infraction case when “an official court reporter or temporary court reporter is unavailable to report an action or proceeding.” That provision would remain in place, although it might be relocated by SB 1316 (Committee on Judiciary), the bill implementing the Commission’s proposal on *Statutes Made Obsolete by Trial Court Restructuring*. See Memorandum 2002-17, pp. 33-34.

Moreover, the special provision permitting electronic recording for the Contra Costa County commissioner would also be preserved. SB 1371 would not touch that provision; SB 1316 would repeal it and reenact it in a manner acceptable to the Contra Costa County Superior Court. See Memorandum 2002-17, p. 29.

Thus, there is no cause for the Contra Costa Superior Court to be concerned, and we will try to explain as much to court personnel. **No revisions to address the court's concerns appear necessary.**

Court Reporters' Suggestion Regarding Government Code Section 69950

CCRA and the Los Angeles County Court Reporters Association ("LACCRA") support the proposed amendment of Government Code Section 69950, which reads:

69950. (a) The fee for transcription for original ribbon or printed copy is eighty-five cents (\$0.85) for each 100 words, and for each copy for the party buying the original made purchased at the same time by the court, party, or other person purchasing the original, fifteen cents (\$0.15) for each 100 words.

(b) The fee for a first copy to any court, party, or other person who does not simultaneously purchase the original shall be twenty cents (\$0.20) for each 100 words, and for each additional copy, made purchased at the same time, fifteen cents (\$0.15) for each 100 words.

Comment. Section 69950 is amended to conform to the rule that a nonparty is generally entitled to obtain a transcript. See Code Civ. Proc. § 269 & Comment.

The section is also amended to reflect changes in technology. When the provision was first enacted, carbon paper was still in use and it was routine to create a copy at the same time as the original. Now the original typically is made first, then copied.

The section is further amended to specify the fee where the person who purchases the original subsequently (as opposed to simultaneously) purchases a copy.

Memorandum 2002-14, Exhibit pp. 4, 8. These groups also suggest that the provision be further amended to state: "For purposes of this section, 'word' is defined as a printed character or combination of characters, a line number, a page number, or a 'Q' and 'A' that designates a speaker." *Id.*; see also CCRA's support letter on SB 1371 (attached).

The Commission has not studied this issue or obtained input from interested parties. The proposed clarification might be reasonable, but it might also trigger

opposition that would not otherwise exist. The staff **recommends against revising the Commission’s proposal to include the proposed language.** If CCRA wants to address the issue, it could be pursued as a separate reform.

Comments of Los Angeles County Superior Court Regarding Code of Civil Procedure Section 269

Code of Civil Procedure Section 269 requires that the arguments of “the prosecuting attorney to the jury” be included in the transcript. SB 1371 would revise the statute to refer simply to the arguments of “the attorneys to the jury,” consistent with existing practice and with other statutes.

The Los Angeles County Superior Court suggests that the statute should also cover arguments of the attorneys to the court in a bench trial:

Judges sitting on court trials usually take detailed notes. However, as was pointed out, it might perfect the clerk’s transcript on appeal to include the argument to the court at the conclusion of a court trial.

Memorandum 2002-14, Exhibit p. 49.

This might be a helpful clarification, but **we are reluctant to engage in such fine-tuning at this point in the process,** when the Commission has worked hard to achieve consensus on the provisions in its bill. If a revision along these lines is necessary, it could be implemented by future legislation.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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March 7, 2002

The Honorable Bill Morrow
Member of the Senate
State Capitol, Room 4048
Sacramento, CA 95814

Re: **SB 1371**
Support

Dear Senator Morrow:

This office represents the California Court Reporters Association (CCRA). CCRA supports your SB 1371.

CCRA has communicated its position to the California Law Revision Commission (CLRC) which we are advised is the sponsor of SB 1371.

CCRA also requested CLRC to amend Government Code 69950 by adding the following language:

For purposes of this section, "word" is defined as a printed character or combination of characters, a line number, a page number, or a "Q" and "A" that designates a speaker.

We have not had a response to this request. CCRA requests you amend your bill as described above.

Sincerely,



FRANK MURPHY, JR

FMJr/jed

cc: The Honorable Martha Escutia
✓ Gloria Ochoa of Senate Judiciary Staff