Appellant's Objection to New Reporter's Record

No. 72,795

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

DARLIE LYNN ROUTIER, Appellant

v.

THE STATE OF TEXAS, Appellee

APPELLANT'S OBJECTIONS TO NEW REPORTER'S RECORD AND MOTION TO ORDER THE TRIAL COURT TO CONDUCT A HEARING

On Appeal from the
Criminal District Court No. 3 of
Dallas County, Texas
Trial Court No. F96-39973-J

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, DARLIE LYNN ROUTIER, Appellant in the above styled and numbered cause, and moves this Court to order the trial court to conduct an evidentiary hearing on her objections to the new reporter's record. Appellant further moves the Court to consider this Motion ***en banc***. In support of this motion, the Appellant would show the following:

INTRODUCTION

This motion is brought pursuant to TEX.R.APP.P. 34.6(e)(3) which provides that an appellate court may direct a trial court to resolve disputes regarding the accuracy of the appellate record.

The history of this case pertaining to the accuracy of the appellate record is extensive.

Appellant previously filed motions in this Court seeking corrections to the original reporter's record prepared by Sandra Halsey. By orders dated October 14, 1998, and April 26, 1999, this Court directed the trial court to ensure that the reporter's record is made to conform to what occurred at trial. In a series of hearings and series of orders of the trial court, ultimately the Halsey record was ordered stricken by the trial court and a new reporter's record has been filed in this Court. Some confusion existed in the trial court as to the breadth of this Court's previous orders to correct the Halsey record and this confusion extended apparently to personnel of this Court.

This was apparent when this Court assured appellant that her brief would not be due until 30 days after the trial court enters an order resolving the accuracy of the appellate record. However, on the eve of a scheduled hearing on appellant's objections to the new reporter's record, the trial court issued an order which concluded it had already complied with this court's previous orders and that it could not resolve the objections to the new reporter's record unless specifically authorized by this Court to do so. 2 SCR(Supplemental Clerk's Record,

Vol. 2)-368; App.(Appendix) 12.

Although there were a multitude of hearings in the trial court, it would be illogical and fundamentally unfair to treat any of the proceedings that the trial court conducted as a hearing on her objections to the accuracy and completeness of the new record. Appellant did not receive notice that the proceedings were conducted for the purpose of resolving the disputes about the new record. All of the proceedings occurred before Appellant received her copy of the 50 new volumes of the record, reviewed the 30,000+ changes that the new court reporter made, and filed her objections to the new record. Some of Appellant's most important objections to the new record were based on facts that did not exist at the time of the proceedings. Appellant never had a chance to call any witnesses or question the new court reporter. All of the basic requirements of due process would be violated if the disputes about the record in this capital case were settled in that manner.

Furthermore, despite all its other efforts to produce an accurate reporter's record, the trial court has yet to address one of the specific issues raised in Appellant's Motion To Correct/Clarify Reporter's Record filed on October 13, 1998, which this Court granted and directed the court to resolve in this Court's order of October 14, 1998. Specifically, Appellant complained of the absence of any reference in the record to the Appellant's presence or absence during the trial court's consideration and ruling on two of three jury notes. 1 SCR-39-41; App. 1. No action on this issue was taken by the trial court before (or even after) filing the new reporter's record in this Court. Questions never asked of either the original or new court reporter were whether the stenographic notes reflect the Appellant's presence and, if not, the bases for the parentheticals or lack thereof in both versions of the reporter's record as to Appellant's presence or absence at these times. As will be developed more thoroughly later in this motion, the new reporter contradictorily adopted most (but not all) of the original reporter's parentheticals while personally expressing the opinion, which was adopted by the trial court, that the original reporter's record could not be relied upon as accurate.

The Court should not require Appellant to file her brief before it decides whether she is entitled to a hearing on her objections to the new reporter's record. To do so would cause an unjustifiable waste of judicial resources under the facts of this case and precedent of this Court.

In County v. State, 668 S.W.2d 303, 317 (Tex.Crim.App. 1989) (McCormick, PJ. concurring) the appeal was abated to resolve a factual dispute about the most important part of the reporter's record. This abatement occurred during consideration of the appellant's motion for rehearing after this Court had affirmed the appellant's conviction and death sentence. Subsequently, the trial court corrected and supplemented the record and this Court reversed the appellant's conviction because of the changes in the record. 812 S.W.2d at 316-17. Presiding Judge McCormick concurred with that result, but he stated:

> How such inaccuracies in the record which directly related to the main issue presented could have been so glaring and go unnoticed for so long is, indeed, appalling. . . . I write this concurrence to iterate the true intent of Rule 55 of Appellate Procedure [which is now codified in TEX.R.APP.P. 34.6(e)] disputes in the record should be resolved before briefs are filed and the cause is submitted to the appellate court.

812 S.W.2d at 317-18 (McCormick, PJ. concurring) (emphasis added).

"Few cases in recent memory present such a chequered history," County v. State, 812 S.W.2d at 317 (McCormick, PJ. concurring), but that history will repeat itself here if the Presiding Judge McCormick's advice goes unheeded. There is already a glaring need for a hearing on Appellant's objections to the new reporter's record and the outcome of her appeal will very likely depend on how the disputes about the record are settled.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant's Initial Objection to the Accuracy of the Original Reporter's Record

The original reporter's record in this case was prepared, certified, and filed by the official court reporter, Sandra Halsey, after this Court held her in contempt for disobeying several filing deadlines.

The first dispute about the accuracy of Halsey's record was raised in APPELLANT'S MOTION TO CORRECT/CLARIFY REPORTER'S RECORD filed in this Court on October 13, 1998. 1 SCR-39; App. 1. Along with questions about the jury notes, Appellant alleged that there were substantive discrepancies between the reporter's record of a portion of Darin Routier's testimony and a transcript of the same portion of his testimony found in the clerk's record that was read back to the jurors during their deliberations. 1 SCR-48-51; CR 155-57; 42 HR 4376-79. Appellant asked this Court to remand the case pursuant to TEX.R.APP.P. 34.6(e)(2)(3), for the trial court to determine whether the record of that part of Darin Routier's testimony was inaccurate. 1 SCR-43; App. 1, pp. 3-4.

On October 14, 1998, this Court issued an order which stated: "... the dispute is submitted to the trial court for resolution. The trial court must ensure that the reporter's record is made to conform to what happened at trial." 1 SCR-52; App. 1.

The Review of the Entire Reporter's Record that the Trial Court Ordered

On October 30, 1998, the trial court decided after a hearing that the accuracy of the entire reporter's record had to be reviewed to comply with this Court's order. 1 SCR-11. Sandra Halsey testified that her stenographic notes of Appellant's trial were simultaneously typed on paper strips and computer edit disks that automatically translated the stenographic symbols into English. Vol. 1, p. 12. Halsey testified that she also made audiotape recordings, but "[t]he only tapes that [she] had where the tape recorder was actually working were the ones from the jury voir dire." Vol. 1, p. 10. Halsey explained that the microphone on her tape recorder did not work during the remainder of the proceedings because it needed a battery. She claimed that she did not discover the problem until "after the trial was over." Vol. 1, p. 10.

The trial court ordered Halsey to review her entire record to determine whether it was accurate and correct any mistakes that she found. Vol. 1, pp. 15-17. The trial court also announced that it was going to appoint independent expert court reporters to compare the stenographic notes on Halsey's computer edit disks to the hard copy of her record so that "if necessary, independent testimony or evidence can be given as to the ability to certify as to the

Reporter's Record." Vol. 1, pp. 14-15.

On November 4, 1998, the trial court appointed three expert court reporters (Tommy Mullins, Judy Miller and Jerry Calloway) to review Halsey's record of both phases of the trial on the merits. Vol. 2, pp. 3, 13; 1 SCR-29.

The Stipulations About the Unauthenticated Audio Tape Recordings

Halsey met with Miller, Calloway, and Mullins and told each of them that she had no audiotapes of the trial on the merits. Vol. 3, pp. 12, 19, 25. However, at another hearing on November 13, 1998, the parties stipulated that Halsey told prosecutor Lindsay Roberts that there were audiotapes reflecting the trial proceedings of the guilt/innocence and punishment phases. Vol. 3, pp. 37-38; Court's Exhibit W, Vol. 3, p. 67. According to the stipulation, Roberts accompanied Halsey to a storage facility in Plano where he retrieved a box of audiotapes that were represented to him as the audiotapes for the Routier trial. Vol. 3, pp. 37-38.

Halsey's daughter, Suzy Crowley, was one of two scopists who helped Halsey edit her original stenographic record before she prepared a hard copy of it. Crowley testified that Halsey gave her audiotapes of the guilt and penalty phases of the trial and the original stenographic record of those proceedings that Halsey typed on computer edit disks. Crowley used the audiotapes to make permanent changes in the English translation of the original stenographic record on the computer disks. Vol. 3, pp. 40-42, 46-49. Crowley did not do any work on the jury voir dire portion of the reporter's record because another person "scoped the jury voir dire." Vol. 3, p. 52.

Crowley looked through at some of the audiotapes that Halsey turned over to Roberts and testified that they "look[ed] similar" to the tapes that she used to change the computer disks. Vol. 3, p. 42-43. Crowley did not say whether Halsey gave Roberts all of the audiotapes of the guilt and penalty phases of the trial nor did she specifically identify the tapes displayed to her as being all the tapes she had reviewed. Vol. 3, pp. 42-43.

When the State introduced the audiotapes that Roberts received from Halsey and the stipulation, counsel objected that Appellant did not agree that these were in fact the tapes from the trial or that they were authentic. Vol. 3, p. 39. And the prosecutor confirmed that he was not making any representation to the court about the authenticity of the audiotapes. Vol. 3, p. 39. The tapes were admitted into evidence with the understanding that the question of their authenticity would be subject to further review. Vol. 3, p. 39. To date, the trial court has never ruled on that question.

On December 9, 1998, Halsey's lawyer produced 12 additional audiotape recordings to comply with a subpoena for all of her audiotapes of the trial. Vol. 7, pp. 3-9, 19-20; 1 SCR-23. No sworn testimony about the identity or history of the tapes has been introduced and they too have never been authenticated.

Halsey's Invocation of Her Right Against Self Incrimination

The trial court relieved Halsey of her duties as the official court reporter in this case with the consent of both sides after she turned over the unauthenticated audiotape recordings. Vol. 3, pp. 57-59; 1 SCR-21. When this hearing was reconvened counsel tried to question Halsey as

a fact witness, but she invoked her right against self-incrimination after she testified that she was present at all of the proceedings in Appellant's case including the pretrial hearings. Vol. 5, p. 8-11.

The Findings and Recommendations of the Trial Court's Experts

On November 13, 1998, Miller, Calloway, and Mullins testified that they each reviewed Halsey's record of the part of Darin Routier's testimony that was read back to the jury and other selected excerpts of the reporter's record of the trial on the merits. Each expert compared the hard copy of those parts of the Halsey record to the stenographic symbols on Halsey's computer edit disks. Vol. 3, p. 8. Each expert testified that there were significant discrepancies between the hard copy of the record and the stenographic symbols on the disks. Vol. 3, pp. 14, 20, 35. In the opinion of each expert, it was clear that Halsey used audiotape recordings to make changes in the English translation of the stenographic record, and then printed a hard copy of the altered record and filed it with this Court. Vol. 3, pp. 12, 20, 26.

Each expert court reporter recommended that the entire Halsey record should be reviewed by another reporter. Vol. 3, pp. 14, 16, 22. Mullins, noting that the "stenographic notes [are] the official record of the court," Vol. 3, pp. 12-13, specifically recommended that Halsey's stenographic notes and the unauthenticated audiotapes should both be compared to the hard copy of Halsey's record. Vol. 3, p. 14-15.

The Trial Court's Order for a New Court Reporter to Review Halsey's Record of the Guilt and Punishment Phases of the Trial

The trial court accepted the recommendations of its experts to appoint a new court reporter review Halsey's record. Vol. 3, pp. 59, 61. The parties agreed that Susan Simmons should do the job. Vol. 4, pp. 8-9.

The trial court initially ordered Simmons orally and in writing to compare the hard copy of the Halsey record of the guilt and punishment phases of the trial with Halsey's paper stenographer's notes, her computer edit disks and the tape recordings "in compliance with standard industry practice," make all corrections which she deemed necessary, produce a record "of everything she has reviewed" and certify to the accuracy of a new record, "if possible." Vol. 5, p. 16; 1 SCR-21.

When the trial court orally announced that order, counsel objected that it was not legally permissible for Simmons to certify a new record. Vol. 5, p. 18. The trial court responded, "I imagine that will be an issue taken up with a different court than this one." Vol. 5, p. 18.

On November 18, 1998, Appellant filed in this Court a motion to abate this appeal. This motion recited the developments in this case which had so far occurred pursuant to the proceedings conducted under the authority of this Court's order of October 14, 1998. However, it was then apparent that the errors in the Halsey record went far beyond those cited in Appellant's earlier motion to correct/clarify and that Sandra Halsey was refusing to participate in any correction of the record. In turn, the relief needed by Appellant to ensure an accurate appellate record went beyond that which this Court granted in its October order. Appellant requested an abatement to give the trial court jurisdiction to take such steps as necessary to ensure an accurate reporter's record.

This motion was denied, although this Court did extend the original 30 day deadline for compliance with the October order.

The Hearing to Determine Whether Simmons Could Certify a New Record of the Guilt and Punishment Phases of the Trial

On April 1, 1999, the trial court conducted a hearing which the trial court described as "a continuation of hearings which began after October the 14th of 1998, pursuant to an Order issued to this Court by the Court of Criminal Appeals on that date." Vol. 13, p. 3.

The trial court called Simmons and Tommy Mullins to testify as the court's witnesses. The attorneys were only allowed to propose questions for them in writing. Vol. 13, p. 3-4. Appellant had filed a written objection that this procedure violated her constitutional rights to due process, effective assistance of counsel, and confrontation. Vol. 13, p. 4; 1 SCR-133; App. 3. The trial court overruled these objections and explained that Appellant would not be permitted to directly question the witnesses "because this is a fact finding hearing and I'm doing this at the direction of the Court of Criminal Appeals..." Vol. 13, p. 4-5. It is unclear whether the court was referring to this Court's direction to conduct this hearing or to not allow Appellant to question the witnesses. While conducting one or more hearings seems a logical extension of this Court's order of October 14, 1998, Appellant is unaware of any order of this Court not to permit counsel to question witnesses at any such hearing(s).

Simmons testified that she created her own new record of the guilt and punishment phases of the trial as well as a red-lined copy of the Halsey record that reflected all of the changes that she made. Vol. 13, pp. 24-29; Court's Exhibit AA; Court's Exhibit BB. Simmons had Halsey's original stenographic notes on paper strips, but she did not produce an English translation of them. Vol. 13, pp. 20, 50, 52-53. She did not know whether Halsey changed the original English translation of her stenographic notes on her computer disks before she surrendered the disks. Vol. 13, p. 51-52.

The procedure that Simmons used to create her new record was different than the procedure that a court reporter ordinarily uses to create a hard copy of the record from the original stenographic notes that were simultaneously typed during the trial on paper strips and the computer disks where the reporter's symbols are automatically translated into English on a split screen. Vol. 13, p.p. 15-23. Simmons testified that the first step of the standard procedure is to load the original stenographic record that the reporter typed on her computer edit disks to a split computer screen that displays the stenographic symbols and an English translation of them side by side. Vol. 13, pp. 12-15. The reporter listens to an audiotape as she reads the English translation on the computer screen and makes any necessary changes in the English translation. Vol. 13, p. 16. The edited English translation on the screen is downloaded onto new computer disks, proof read, and saved again on the new disk. A hard copy of the proof read English translation on the new disks is printed out and filed with the court. Vol. 13, pp. 15-17.

Instead of the normal procedure, Simmons started by systematically comparing the hard copy of the Halsey record with the unauthenticated audiotapes instead of comparing the tapes to the English translation of the stenographic record on Halsey's computer disks which Halsey could have changed. Vol. 13, pp. 23; 51-52. When Simmons found a mistake in the hard copy of the Halsey record, she made a hand written change on it in red ink. Vol. 13, p. 23. She

described this process as an audio edit of the Halsey record. Vol. 13, p. 28.

Simmons had Halsey's original paper stenographic notes beside her when she used the unauthenticated audiotapes to change the hard copy of the Halsey record, Vol. 13, p. 23, but she did not systematically compare the notes to those materials. Simmons testified that she would only flip to the paper stenographic notes that Halsey typed if she came to a part of the hard copy of the Halsey record that she was unsure of when she compared it to the audiotape. Vol. 13, p. 24. Simmons explained that she also consulted the paper notes when she had a question about the identity of a speaker. Vol. 13, p. 36. She never indicated that she referred to the paper notes for any other purpose.

Tommy Mullins testified that it was common practice for a court reporter to use audiotapes for "editing" purposes to create a record that is different in some respects from the original stenographic notes. Vol. 13, p. 48. Neither Mullins nor Simmons nor any other witness indicated what the usual level of discrepancy was or whether Halsey's record exceeded it. Both Mullins and Simmons agreed in response to the trial court's leading questions that it is normal for a new record and the original stenographic record not to match exactly. Vol. 13, pp. 48; 52-54.

Simmons testified that the unauthenticated audiotapes of the guilt and punishment phases of the trial were complete, audible and had no discernable gaps when she listened to them, but she did not offer an expert opinion about whether any of the tapes were edited or erased before she received them. She acknowledged that her new record could be tainted if there was a defect in the tapes that she could not detect by playing them. Vol. 13, p. 36. She claimed that she could certify that her record was a true and correct transcription of what happened at the guilt and penalty phases of the trial even though she had no personal knowledge of the proceedings, the identity of the audiotapes, or their integrity. Vol. 13, pp. 37, 51.

Appellant filed and presented a written motion to make a bill of exception about some of the questions that she was not allowed to ask Simmons. Vol. 13, p. 4; 1 SCR-133; App. 3. Appellant's bill stated that she would have asked Simmons whether she compared each line of the Halsey record to Halsey's original stenographic notes and if not, why. 1 SCR-134-5; App. 3, pp. 2-3. Her bill stated that she also would have asked Simmons to describe exactly how she used Halsey's original stenographic notes to prepare her record. 1 SCR-134; App. 3, p. 2. The trial court did not ask Simmons those specific questions.

Appellant's Request for an Opportunity to Call Witnesses to Testify About the New Record After She Reviewed It

Appellant's attorneys did not receive a copy of Simmons' new 28 volume record of the guilt and punishment phases until after Simmons finished her testimony. Vol. 13, p. 58. Counsel informed the trial court that he might want to call witnesses to testify about the new record after he reviewed it. Vol. 13, p. 58. The trial court responded, "we'll cross that bridge when we get to it." Vol. 13, p. 58.

Appellant's Objection to Filing the New Reporter's Record Before She Had an Opportunity to Review that Record and Compare It to Halsey's Original Stenographic Notes

Appellant filed written OBJECTIONS TO FILING A NEW OR CORRECTED COPY OF

THE REPORTER'S RECORD and presented them to the trial court for a ruling at the beginning of the April 1, 1999, hearing. Vol. 13, p. 4; 1 SCR-139; App. 4. Appellant asserted in this pleading that she was unwilling to agree to the filing of the Simmons record without reading it because Simmons used the uncertified, unauthenticated audiotapes to create a new record instead of transcribing Halsey's stenographic notes. 1 SCR-142; App. 4, p. 4. Appellant further stated that she was unable to prove that there were specific discrepancies between the Simmons record and Halsey's steno notes because the trial court did not give her attorneys an opportunity to compare those materials. 1 SCR-147-8; App. 4, pp. 9-10. Appellant also asked the trial court to order Simmons to systematically compare Halsey's stenographic notes to her record, the Halsey record, and the audiotapes or give her attorneys a reasonable opportunity to do so before a new record of the guilt and penalty phases was filed with this Court. 1 SCR-144-5; App. 4, pp. 6-7. The trial court promised to address those issues with a written order. Vol. 13, pp. 4, 57.

The Trial Court's Order to Replace the Original Reporter's Record of the Guilt and Penalty Phases of the Trial and Give Appellant an Opportunity to Object to the New Record After She Reviewed It

On April 14, 1999, the trial court signed an order which stated that the Halsey record of the guilt and punishment phases of the trial should be replaced by the Simmons record because Halsey's record of those proceedings did not conform to what happened at the trial. 1 SCR-127; App. 5. The trial court believed Simmons' testimony that her record of the proceedings was true and correct and arranged for her new record to be filed with this Court before Appellant had an opportunity to review it. 1 SCR-128-9; App. 5, pp. 2-3. The trial court did not independently review the new record before it made that finding. Vol. 20, p. 9.

The trial court's April 14, 1999 order gave Appellant 120 days to read the 28 new volumes that she received that day and file any objections to the new record or motions for further relief because the interests of justice required it. 1 SCR-128-9; App. 5, pp. 2-3.

The Hearing to Determine Whether Simmons Could Certify a New Record of the Voir Dire and Other Pretrial Proceedings

On April 26, 1999, this Court granted Appellant's motion to order the trial court to review Halsey's record of the voir dire and pretrial hearings to determine whether it conformed to what happened at the trial. App. 6.

On October 14, 1999, the trial court called Simmons as its witness and questioned her about her record of those proceedings again without allowing the attorneys to do so. Appellant renewed her objections to that procedure and they were overruled. Vol. 23, pp. 29-30. Simmons testified that she used the same materials and procedures to produce a new certified record of the voir dire and pretrial hearings that she used to prepare a new record of the guilt and penalty phases of the trial. Vol. 23, pp. 5-17.

The Trial Court's Order to Replace the Original Reporter's Record of the Voir Dire and Other Pretrial Proceedings and Give Appellant an Opportunity to Object to the New Record After She Reviewed It

On November 5, 1999, the trial court issued an order which stated that Halsey's record of the voir dire and pretrial hearings should be replaced by the Simmons record of those

proceedings because it did not conform to what happened at the trial. 1 SCR-103; App. 7. The trial court believed Simmons' testimony that her record of those proceedings was true and correct, but it gave counsel an additional 120 days to file any objections that she had to the Simmons record or motions for further relief. The trial court instructed Appellant to file a separate motion to request a hearing on her objections to the Simmons record that set forth in detail why a hearing is necessary. 1 SCR-105; App. 7, p. 3.

The Uncertified Part of the New Reporter's Record

On December 13, 1999, another hearing was conducted regarding the discovery that Simmons did not prepare a new record of the pretrial proceedings that were reported in Volumes 10 and 11 of Halsey's record. Simmons was instructed to review both volumes and certify a new record of those proceedings if she could. Vol. 25, pp. 3-7.

On January 28, 2000, Simmons testified about her review of Volumes 10 and 11. Simmons prepared a new certified record of the proceedings reported in Volume 11 and the proceeding on the afternoon of October 21, 1996, that was reported in Volume 10 by using the same procedures that she used to create the other parts of her new record. Vol. 26; pp. 5-9. Simmons would not certify a new record of the proceeding on the morning of October 21, 1996, that was reported in Volume 10 of the Halsey record. Vol. 26, pp. 9-13.

Simmons testified that she did not receive an audiotape of the proceeding that was conducted on the morning of October 21, 1996, and this was the reason she refused to certify this portion:

> Based on the 10,000 pages that I've done previous to this, and seeing Miss Halsey's record compared to her notes and the audiotape, I don't feel comfortable certifying to the first 53 pages without an audiotape to listen to.

Vol. 26, p. 13.

In Simmons' opinion, Halsey must have used an audiotape to edit that part of her record because the hard copy was different than her paper stenographic notes. Vol. 26, p. 19. Simmons physically included an English translation of Halsey's paper stenographic notes of the proceeding on the morning of October 21, 1996, in Volume 10 in her own record, but her certificate in that volume specifically excludes those 54 pages. 10 SR (Simmons Record)-1-54.

On February 4, 2000, Halsey's attorney informed the trial court that she did not have an audiotape of the proceedings for the morning of October 21, 1996. Halsey's lawyer did not indicate whether she made a tape and lost or destroyed it. Vol. 27, pp. 3-4.

On February 9, 2000, the trial court issued an order that adopted Simmons' testimony about the pages in her record that she did not certify. 2 SCR-566; App. 9. The trial court did not decide whether the uncertified 54 page transcript of Halsey's stenographic notes of those proceedings in Volume 10 of the Simmons record conformed to what happened at the trial or whether there ever existed an audiotape for these 54 pages. 2 SCR-568; App. 9, p. 3. Again, however, the only testimony in this record on this subject is that of Simmons who stated that, in her opinion, there had been an audiotape used in the preparation of this part of the

proceedings. Vol. 26, p. 19.

Appellant's Objections to the New Reporter's Record and Request for a Hearing

In its order dated February 9, 2000, the trial court extended the deadline until March 6, 2000, for Appellant to file objections to the Simmons record and request a hearing on them. 2 SCR-569.

On March 2, 2000, Appellant filed written objections to the Simmons record, 2 SCR-490; App. 10, and a separate motion for a hearing, 2 SCR-480; App. 11. Both pleadings also were submitted to this Court by a letter to the clerk dated March 8, 2000.

Appellant's motion for an evidentiary hearing identified twenty-seven specific disputed factual questions about the new record. 2 SCR-480; App. 11.

Appellant's nine objections to the new record were presented in a detailed twenty-eight page pleading. There was a point heading, statement of facts, and arguments and authorities for each objection. Her objections challenged virtually all of the substantive changes that Simmons made in the record; the loss or destruction of specific parts of the record; the procedures that Simmons used to create her record; and the use of Halsey's certificates on the old record to certify any part of the new record that Simmons would not certify. 2 SCR-490; App. 10.

She promised to introduce an English translation of Halsey's original stenographic notes to prove her objection that Simmons used the unauthenticated audiotapes to make thousands of inaccurate substantive changes in the record. 2 SCR-508, n. 7; App. 10, p. 19, n. 7.

Numerous exhibits were attached to Appellant's objections to the new reporter's record to substantiate her allegations about facts that were not in the record of the previous proceedings that the trial court conducted. Appellant's exhibits included statements that Halsey made at a hearing to revoke her license and to the press after she invoked her Fifth Amendment right not to testify in this case. These included Halsey's concession that there could be something wrong with her own audiotapes and she would not depend on them. 2 SCR-558; App. 10, p. 69. Halsey warned that her audiotapes should not be used to create a record because they could be blipped. 2 SCR-558; App. 10, p. 69. Halsey confessed that she knew that her record was inaccurate when it was filed. 2 SCR-524; App. 10, p. 35. Halsey admitted that she lied to the trial court to try to conceal defects in her record because she did not want Appellant to get a new trial. 2 SCR-528; App. 10, p. 49. Among other things, she blamed this Court's "threatening me with jail" as why she filed her record knowing it was inaccurate. 2 SCR-525; App. 10, p. 36.

The trial court had previously stated it was "quite troubled" by the fact that a witness might "invoke her Fifth Amendment right not to testify here in court [and then] give their opinions to the press, attempting to influence public opinion ... because this is not a game... There are definitely two children who are dead and a woman who been sentenced to death..." Vol. 27, p. 4.

Attached to these written objections were 42 pages of exhibits supporting the pleading. 2 SCR-490; App. 10, pp. 29-70. In its order of September 7, 2000, the trial court found that Appellant's "objections are clear, concise, and sufficiently apprise this court and will apprise

the Court of Criminal Appeals as to [Appellant's] objections." The trial court further found Appellant "adequately preserved her objections for review." 2 SCR-368; App. 12.

Of course, what Appellant was seeking went beyond a mere understanding of her objections: Appellant was then (and is now) seeking a ruling on these objections in a proceeding which comports with due process by permitting testimony, evidence, and argument.

Appellant would urge this Court, in consideration of this motion, to review in full Appellant's written objections filed in the trial court. 2 SCR-490; App. 10. Appellant would ask further that particular note be made of Exhibit E of the written objections. Therein are listings of multiple substantive changes Simmons made in Halsey's reporting of non-verbal responses, among other things. For instance, during voir dire a juror, per Halsey, responded to a question by answering "Um-hum." 12 HR-367. However, Simmons revised this to "Uh-huh," which of course is inconsequential, but then Simmons added the parenthetical "(Witness nodding head affirmative)." 12 SR-367. Appellant will assume that Simmons could not hear on the audiotape the juror nodding his head. And since Simmons has testified it was not part of her job to deal with Halsey's parentheticals (2 SCR-556; App. 10; p. 67), just where did this new parenthetical come from? This same scenario is presented in comparing 12 HR-255 with 12 SR-254 as well as 13 HR-627 with 13 SR-668, to point out but a few. Simmons also changes responses of a juror, apparently based on whether she could hear it on the audiotape. See 13 HR-467 and 13 SR-467. Now Appellant understands as well as anybody Simmons' refusal to vouch for Halsey's steno notes or reporter's record without audiotape corroboration, but that only amplifies the problems presented by this record reconstruction effort to begin with, plus it places the parenthetical issue at the fore. The principle of presumed

regularity cannot be applied to Halsey's parentheticals given her history of lying and knowingly submitting an inaccurate record. But coupling this with Simmons' stated refusal to put anything in her record which she could not corroborate, leaves all the parentheticals in this case subject to challenge. Are the above examples significant errors warranting a new trial? Of course not, but there is a Witherspoon disqualified venireman for whom parentheticals describing his "nodding head affirmative" or "shaking head negative" will be critical for Appellant's error on disqualifying the juror. Plus, there are similar issues in the trial testimony which are not part of this record now because the trial court cancelled the hearing.

The issue at this stage of the proceedings is not "what difference does it make?" Rather, it is whether this record can be relied upon as accurate, made more accurate, or at least can the proceedings comport with due process in order for the ultimate issues to be decided with Appellant having an opportunity to make her case, an opportunity which so far has been denied.

The Cancellation of the Hearing on Appellant's Objections to the New Reporter's Record

The trial court set Appellant's case on the calendar for September 8, 2000, to conduct a hearing on her objections to the new reporter's record. 2 SCR-465; 391. Appellant served subpoenas for Halsey, Simmons and nine other witnesses to testify at the hearing. 2 SCR-560-1; 370- 372; 374; 381; 383; 385; 387; 389. The trial court also signed Appellant's subpoena for an out of state witness who was flown from Virginia to Dallas at the expense of the taxpayers. 2 SCR-464-67. Appellant filed a motion to suppress the unauthenticated audio

tapes. The State acknowledged in its response to the motion that it expected the trial court to conduct the hearing and allow the parties to question Simmons about the new record. 2 SCR-391. The trial court cancelled the hearing on the day before it was scheduled to take place with the issuance of its September 7, 2000, order. 2 SCR-368; App. 12.

The Trial Court's Response to Appellant's Objections to the New Reporter's Record and Request for a Hearing

On September 7, 2000, at 3:15 p.m., the trial court issued a one and a half page order which made the following findings:

> 1. The trial court found that it complied with all of the orders that the Court of Criminal Appeals issued before Appellant filed her objections to the new reporter's record;
>
> 2. All of the prior findings and orders previously issued by the trial court before Appellant filed her objections to the new record were incorporated without making any findings of fact or conclusions of law about those objections;
>
> 3. Appellant's written objections to the new reporter's record and motion for a hearing adequately preserved all of her claims because any tribunal would be able to discern the basis for them;
>
> 4. An additional evidentiary hearing is not necessary to comply with the orders of the Court of Criminal Appeals that were issued before Appellant filed her objections to the new record; and
>
> 5. No additional evidentiary hearings shall be conducted by the trial court unless the Court of Criminal Appeals instructs otherwise.

2 SCR-368; App. 12. (Emphasis added.)

The Trial Court's Refusal to Act on Appellant's Formal Bill of Exception or to Allow Appellant to Make an Offer of Proof About the Evidence that She Would Have Introduced at the Hearing on Her Objections to the New Reporter's Record

On September 25, 2000, Appellant filed her Defendant's Formal Bill of Exception No. 1 together with a proposed order. 2 SCR-282; 285; App. 13. Contemporaneously with this pleading, Appellant filed a Motion For A Hearing To Make an Offer Of Proof Of The Evidence That She would Have Introduced At The Hearing On Her Objections To The "Simmons Record." 2 SCR-286; App. 14.

The trial court responded to these pleadings with an order on October 3, 2000, finding that "it lacks jurisdiction to consider any additional filings in this case unless the case is again remanded to this court by the Court of Criminal Appeals." 2 SCR-281; App. 15.

ARGUMENT AND AUTHORITIES

THIS COURT SHOULD REMAND THE CASE FOR AN EVIDENTIARY HEARING TO SETTLE ALL OF THE DISPUTES ABOUT THE NEW REPORTER'S RECORD BEFORE APPELLANT FILES HER BRIEF.

This case should be remanded for the trial court to conduct an evidentiary hearing on Appellant's objections to the new reporter's record before she files her brief. There are literally thousands of serious factual disputes about the accuracy and completeness of the new record that the trial court did not resolve. It would be fundamentally unfair and wasteful to require Appellant to request a hearing about those issues in her brief because it is already clear that her appeal cannot be decided without one.

1. THE RULES OF APPELLATE PROCEDURE WERE DESIGNED TO GIVE THE APPELLANT AN OPPORTUNITY TO SETTLE ALL OF THE DISPUTES ABOUT THE RECORD BEFORE SHE FILES HER BRIEF.

The rules for settling disputes about the reporter's record were designed to give this Appellant (and all other appellants) an opportunity to prove that it is inaccurate or incomplete before her brief is due because she cannot intelligently identify the potential points of error and supporting record references without knowing what the record will be. Sankey v. State, 3 S.W.3d 43, 44 (Tex.Crim.App. 1999). A remand for a hearing in the trial court is usually required to provide that opportunity because defects in the record are ordinarily discovered after it was filed. Sankey, supra.

Claims of inaccuracy in the reporter's record are governed by TEX.R.APP.P. 34.6(e). Disputes as to the reporter's record which are raised prior to the record being filed with the appellate court "must" be resolved by the trial court "after notice and hearing." Rule 34.6(e)(2).

Claims of inaccuracies made after a record is filed with the appellate court may be referred back to the trial court which in turn "must then ensure that the reporter's record is made to conform to what occurred in the trial court." Rule 34.6(e)(3).

TEX.R.APP.P. 34.6(f) supplies a remedy for the loss or destruction of the reporter's record or part of it that usually cannot be implemented without a hearing in the trial court. Rule 34.6(f) requires a new trial if a significant part of the reporter's record necessary to the appeal was lost or destroyed through no fault of the appellant. A hearing must ordinarily be conducted in the trial court to determine whether there was a court proceeding that does not appear in the reporter's record; whether a stenographic record of the proceeding was made; whether the record was lost or destroyed; and whether the appellant was not responsible for it. Dunn v. State, 733 S.W.2d 212, 215-16 (Tex.Crim.App. 1987). The appellate courts only have to conduct a harm analysis to determine whether there must be a new trial after those facts are developed. Isaac v. State, 989 S.W.2d 754 (Tex.Crim.App. 1999).

Disputes about the accuracy and completeness of the appellate record can be settled after the briefs are filed because there is no deadline for raising the issue, Riggs v. Tech./III Inc., 836 S.W.2d 302 (Tex.App.- Dallas 1992, no writ), but it is fundamentally unfair and wasteful to

postpone a decision about whether to conduct a hearing on the matter until after the appellant filed a brief. County v. State, 668 S.W.2d at 317 (McCormick, PJ. concurring). This is especially true in capital cases because meaningful appellate review of a complete and accurate record is a constitutional requirement when the death penalty was imposed. Dobbs v. Zant, 506 U.S. 357 (1993); Dunn v. State, 733 S.W.2d 212, 214 n.5 (Tex.Crim.App. 1987).

The potential costs of postponing the decision about whether to have a hearing on an objection to the accuracy and completeness of the record in a capital case until after the Appellant files her brief clearly outweigh the possible benefits. The administration of justice will be delayed and judicial resources will be squandered if the appeal must be abated or reconsidered to correct a defect in the record that could have been cured before the case was submitted. County v. State, supra, 668 S.W.2d at 317 (McCormick, PJ. concurring). Full briefing of a complaint about the record may reveal that the alleged defect is not harmful enough to be a reversible error, Isaac v. State, supra, but the harmless error doctrine does not apply to interlocutory disputes about the record that were raised in motions before the appeal was submitted.

2. THE TRIAL COURT DID NOT RESOLVE ANY OF THE FACTUAL DISPUTES ABOUT THE ACCURACY OR COMPLETENESS OF THE NEW REPORTER'S RECORD.

The trial court's very brief order on September 7, 2000, did not expressly or implicitly resolve any of the disputed questions of fact about the accuracy and completeness of the new reporter's record. The trial court only decided that it did not have the authority to conduct an evidentiary hearing to settle those disputes unless this Court expressly orders it. Any other interpretation of the trial court's order would mean that the trial court acted irrationally or intentionally disregarded the elementary requirements of due process.

A. It Was Reasonable for the Trial Court to Believe that It Had No Jurisdiction to Conduct a Hearing to Resolve the Disputes About the New Record Without an Order From this Court.

To determine what the trial court's order means, this Court should apply the well-settled rule that trial judges are presumed to know the law and to apply it in making their decisions, unless the record shows otherwise. Walton v. Arizona, 497 U.S. 639,653 (1990). The plain language of Rule 34.6(e)(3) gives the appellate court discretion to decide whether a particular dispute about the reporter's record should be submitted to trial court after the record was filed. Rule 34.6(e)(2) requires the trial court to conduct such a hearing if the appellate court exercised that discretion, but the trial court correctly found that it had no power to conduct a hearing about a dispute that was not submitted to it for resolution.

The fact that the trial court found that it did not have jurisdiction to allow Appellant to make an offer of proof about the evidence that she would have introduced at a hearing on her objections to the new record confirms that the trial court believed that it did not have jurisdiction under Rule 34.6(e)(2) to conduct the hearing. See Drew v. State, 743 S.W.2d 207, 225-28 (Tex.Crim.App. 1987) (offer of proof about evidence Appellant would have presented at hearing cannot be considered if trial court had no jurisdiction to conduct the hearing).

A comparison of the language of Rule 34.6(e)(3) and the former TEX.R.APP.P. 55(a) should

have convinced the trial court that an order from this Court to resolve the disputes about the new reporter's record at a hearing was not a mere formality. The former Rule 55(a) provided that when a dispute about the accuracy of the reporter's record was raised after it was filed, "the appellate court shall submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute." (Emphasis added.) Rule 34.6(e)(3) now provides that the appellate "court may submit the dispute to the trial court for resolution." (Emphasis added.) Since the rule was deliberately changed to eliminate a mandatory remand for a hearing to resolve disputes about the reporter's record after it was filed, the trial court could not presume that this Court would order one. See generally Marin v. State, 875 S.W.2d 275, 278 (Tex.Crim.App. 1993) (explaining difference between mandatory and discretionary rules of law).

This Court never issued an order that expressly authorized the trial court to conduct a hearing to settle the factual disputes about the new reporter's record. The Court only ordered the trial court to review the old record and make it conform to what happened at the trial before the new record was filed. It was not even clear that the trial court had the authority to go that far because this Court's orders were issued in response to Appellant's objections to a very small part of the old record. The trial court extended the plain language of this Court's orders to their outer limits by endeavoring, over a two year period, to replace the entire original record with a new one instead of correcting the parts of the old one that were specifically disputed. But given the discoveries about the extravagant inaccuracies of the entire Halsey record, this was at least a reasonable goal set by the trial court in order to "ensure that the reporter's record is made to conform to what occurred at trial."

Under the extraordinary circumstances, it arguably was reasonable for the trial court to conclude that it did not have the authority to conduct a full hearing about all of disputes about the completeness and accuracy of the new record unless this Court exercised its discretion to remand the case for a hearing to resolve those disputes.

B. The Findings that the Trial Court Made Before Appellant Objected to the New Record Did Not Resolve the Disputes About It that She Raised.

It is inconceivable that the trial court intended to implicitly resolve all of the factual disputes about the new reporter's record in its order on September 7, 2000, by incorporating its previous findings that the new record conformed to what happened at trial with the exception of the 54 uncertified pages in Volume 10. The trial court did not even know what the factual disputes about the new record were when it made those earlier findings because Appellant not only could not, but, as directed by the court, did not file her objections to the new record until months later.

The trial court certainly did not resolve the crucial factual dispute about whether the reporter's record of a hearing to determine whether trial counsel had a conflict of interest was lost or destroyed. The new and old records show that trial counsel had a potential conflict of interest because he represented Appellant's husband at a contempt proceeding in this case. The new and old records show that the State asked the trial court to conduct a hearing to decide whether counsel had an actual conflict. CR-55; 22 HR-2671-73; 22 SR-2668-70. Halsey testified that she was present at all of the pretrial hearings, but there is no hearing about that conflict in either version of the record. However, Halsey, the trial judge, and the

attorneys agreed in both the old and new records that such a hearing did occur on October 21, 1996. 26 HR-3323-24; 22 SR-3322-23. Simmons testified that Halsey must have made an audiotape of the proceeding that was conducted in the morning on that date. That proceeding was the only part of the trial that was not recorded on the audiotapes that Halsey turned over. The trial court allowed Simmons to include the uncertified stenographic record of the proceeding in her record without deciding whether it conformed to what happened at the trial.

The trial court must have known that the appeal cannot be decided without deciding whether the record of a hearing about the conflict of interest on the morning of October 21, 1996, (or some other date) was lost or destroyed. See TEX.R.APP.P. 34.6(f). When the trial judge was aware that counsel had a potential conflict of interest, as he was in this case, he must conduct a hearing on the record to determine whether it is an actual conflict and, if so, whether the appellant will voluntarily and intelligently waive the right to complain about it. Wheat v. United States, 486 U.S. 153, 159 (1988) (prosecutor requested hearing); Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (counsel requested hearing). Harm must be presumed if there was no record of such a hearing. Calloway v. State, supra, 699 S.W.2d at 829.

Some of the most significant evidence that Appellant offered to introduce at a hearing on her other objections to the new record did not even exist when the trial court found that the new record conformed to what happened at the trial. Halsey admitted that she would not trust her own audiotapes after the trial court allowed Simmons to use those tapes to create a new record without comparing them to Halsey's stenographic notes. Halsey, who was subpoenaed for the September 8, 2000, hearing, could have been compelled to testify about these statements and her conduct involving her record because she waived her right against self-incrimination in this case by answering questions about the subject at her license revocation hearing. Victoria v. State, 522 S.W.2d 919 (Tex.Crim.App. 1975) (citing Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969)). The integrity of the new record will remain in doubt until Halsey is asked to explain, among other things, under oath exactly what was wrong with the tapes that Simmons used to create it.

Simmons also gave highly relevant testimony about her new record at the license revocation hearing, a proceeding which also occurred after the trial court found that her record conformed to what occurred at Appellant's trial. Simmons testified that she included in her record all of Halsey's parenthetical descriptions of hundreds of non-verbal facts about the answers to voir dire questions and Appellant's presence or absence during the trial without trying to determine whether they were accurate. 2 SCR-556; App. 10, p. 67. Appellant objected that all of those parentheticals were inaccurate and had to be deleted from the new record because Simmons could not certify them. 2 SCR-504-8; App. 10, pp. 15-18. The trial court did not resolve that dispute or any of the other questions that Appellant raised about the new record.

C. The Trial Court Must Have Known that the Hearings that It Conducted Before Appellant Reviewed the New Record and Filed Her Objections to It Were Constitutionally Inadequate to Resolve the Disputes About the New Record.

It is inconceivable that the trial court found that the hearings that it conducted before Appellant filed her objections to the new record were constitutionally adequate to resolve the

disputes about that record. The trial court presumably knew that the due process clause required notice of the issues to be decided and a reasonable opportunity for Appellant to present her side of the case about the new record with the assistance of counsel. Chessman v. Teets, 354 U.S. 156 (1957). Appellant did not receive notice that the hearings were conducted to resolve the disputes about the new record. Appellant did not have an opportunity to read the new record and object to it before those hearings. Appellant did not have a chance to call any witnesses or exercise her absolute right to make an offer of proof about what their testimony would have been. The trial court also refused to allow her attorney to cross-examine Simmons. This ruling is unprecedented under Texas case law. Cf. Morrison v. State, 845 S.W.2d 882 (Tex.Crim.App. 1993) and cases cited therein (trial court's asking of question, in addition to the lawyers, strongly cautioned and limited to clarifying questions). Counsel were so concerned about this abrogation of fundamental rights that a written objection was filed. 1 SCR-133; App. 3.

3. THE TIME AND MONEY THAT THE TRIAL COURT EXPENDED TO CREATE A NEW REPORTER'S RECORD THAT CONFORMED TO THE UNAUTHENTICATED AUDIO-TAPES WITHOUT DETERMINING WHETHER HALSEY'S ORIGINAL STENOGRAPHIC NOTES CONFORMED TO WHAT HAPPENED AT THE TRIAL IS NOT AN EXCUSE TO DENY APPELLANT A FAIR OPPORTUNITY TO PROVE THAT THE NEW RECORD IS INACCURATE AND INCOMPLETE BEFORE SHE FILES HER BRIEF.

The only plausible justification for not remanding this case for a hearing on Appellant's objections to the new record that complies with the requirements of due process before she files her brief is the notion that the record is "probably" acceptable because that the trial court invested so much time and money to create it. Of course, time and money prove nothing, as was conclusively shown with the now-stricken Halsey record. To conclude "time and money" are indicia of reliability is misleading, meaningless, and intellectually dishonest under the precedents of this Court and the Supreme Court.

The trial court's investment of its resources to create a new record that conformed to the unauthenticated audiotapes without transcribing Halsey's paper stenographic notes was clearly unwise. Appellant was entitled to verbatim transcription of all the notes taken by the court reporter during the proceedings, Dunn v. State, supra, 733 S.W.2d at 213-214, because Halsey's original stenographic notes, as noted by Tommy Mullins, are the official record of the trial. See TEX.R.APP.P. 34.6(a)(1). Simmons could have produced an accurate official stenographic record by using Halsey's paper stenographic notes to correct the hard copy of the record that Halsey filed.

The record that Simmons created by using the unauthenticated, uncertified audiotapes to change Halsey's inaccurate stenographic record is worthless at the present time. The proper procedure is to (1) transcribe the official stenographic record that Halsey typed; (2) conduct a hearing to settle any disputes about the accuracy of that record; and (3) then make it conform to what happened at the trial if necessary. See TEX.R.APP.P. 34.6(a)(1)(e)(2). The uncertified audiotapes might be used as evidence of what happened at the trial if they can be authenticated, but the reporter cannot use those tapes to create a new record without a hearing and a judicial determination to resolve any disputes about the official stenographic record

after it is accurately transcribed. In re L.B., 936 S.W.2d 335, 337 (Tex.App. - El Paso 1996, no writ); Ex parte Occhipenti, 796 S.W.2d 805 (Tex. App. - Houston [1st Dist.] 1990, orig. proceeding). In fact, the audiotapes could not have been used as the official record even if they were certified by Halsey to be a true and correct recording of what happened at the trial. Soto v. State, 671 S.W.2d 43 (Tex.Crim.App. 1984).

In Williams v. State, 427 S.W.2d 868 (Tex.Crim.App. 1967), the court reporter who attended the trial died before he transcribed some of his stenographic notes and certified the record. The deceased reporter's uncertified partial transcript of the trial, his stenographic notes, and his uncertified backup audiotapes were given to a new reporter who produced and certified a new record. A hearing was conducted to resolve disputes about the new record. At the hearing, the new court reporter acknowledged that he did not compare the audiotapes to the stenographic notes. The new reporter was ordered to make that comparison before the hearing was completed and the record was settled, just as one of the court's experts, Tommy Mullins, recommended in this case. This Court held that the new record was acceptable because the Appellant certainly had his day in court on settlement of the record. Williams v. State, supra, 427 S.W.2d at 872.

Appellant is still waiting for her day in court. The need for a careful comparison of the audiotapes and stenographic notes and a fair hearing to resolve any discrepancies between them is greater here than it was in Williams because there are serious questions about the impartiality of the original court reporter and the integrity of her audiotapes.

Appellant should not be required to file her brief before the trial court conducts a hearing on her objections to the new record just because it will delay her appeal and increase its cost. In Davis v. State, 932 S.W.2d 127 (Tex.App. - Houston [1st Dist.] 1996, no pet), the Court of Appeals remanded the case to the trial court for a third hearing about the accuracy and completeness of the reporter's record with considerable reluctance and sympathy for the trial court because the appellant proffered uncontroverted evidence that the defects in the record were not cured at the previous hearings. Appellant made such a proffer and she is entitled to the same relief.

In Dunn v. State, supra, the trial court engaged in the mammoth task of reconstructing portions of a record of a capital trial that was lost. 733 S.W.2d at 216. It took more than two years to complete the reconstruction with the cooperation of all parties, but it was not legally acceptable. 733 S.W.2d at 216-17. This Court held that it could not be used in spite of all of the resources that were wasted to create it because it is a fundamental and axiomatic rule of law that "no man shall suffer the penalty of death at the hands of the law until he has been accorded his legal rights." Dunn v. State, supra, 733 S.W.2d at 217 (citation omitted). The creation of the Simmons record was also a mammoth task, but that is not an excuse to disregard the laws for settling disputes about the record in a capital case. And as already discussed, the record dispute in County v. State, supra, was not even raised until appellant's motion for rehearing.

In Chessman v. Teets, 354 U.S. 156, 165 (1957), the Supreme Court stayed an execution at the last possible moment and ordered a second hearing on a condemned person's complaints about the appellate record because he was denied due process at the first hearing. The Supreme Court explained,

> Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands.

Chessman v. Teets, 354 U.S. at 165.

Appellant does not want to save her objections to the record as an insurance policy against her execution. Her goal is to obtain a fair appeal and a new trial as quickly as she can reasonably can from the first court that is able and willing to enforce what the constitution demands in this case.

WHEREFORE, for the reasons stated above, the Court should remand the case for the trial court to conduct an evidentiary hearing on all of Appellant's objections to the new reporter's record, resolve all of the factual disputes, make the new record conform to what occurred at the trial if it is possible to do so and grant any other relief that is required by law and justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore- going document was served upon (1) Libby Lange, Assistant District Attorney, 133 N. Industrial Blvd., Dallas, Texas 75207; and (2) Matthew Paul, State's Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by depositing a copy of the same in the U.S. Mail, postage paid, on this the 22nd day of January, 2001.

J. STEPHEN COOPER