

THE STATE OF TEXAS,

vs.

MAX HAHN IV

§
§
§
§
§

IN THE DISTRICT COURT OF

MONTAGUE COUNTY, TEXAS

97TH JUDICIAL DISTRICT

MONTAGUE COUNTY

2016 MAR 0 PM 3:19

FILED FOR RECORD
DISTRICT CLERK

MOTION FOR TRANSCRIPTION OF AUDIO RECORDING

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Max Hahn IV, the Defendant and requests that the court order the prosecution to allow a court reporter to transcribe the audio recordings of an interview of complainant in this case and for cause would show the court as follows:

I.

The Defendant is the subject of an indictment alleging continued sexual abuse of a young child a violation of §21.02, C.C.P. As part of the investigation leading to the indictments in this case, the complainant has been the subject of an interview conducted at the behest of law enforcement, at a Children's Advocacy Center, or Patsy's House. The defense believes the interview has been digitally recorded and preserved and is in the possession of the District Attorney's office.

II.

In the case of *In re District Attorney's Office of the 25th Judicial District*, 358 S.W.3d 244, (Tex. Crim. App. 2011), the Court of Criminal Appeals held that a court's order for the State to make a copy of a recorded interview of a child was authorized by Article 39.14(a), C.C.P. In response to the foregoing, the legislature passed §264-408(d-1), Family Code (eff. 6/17/11), which limited the defendant's access to **videotaped** recordings of the interview of the

child at a child advocacy center, even though almost all of these recordings were recorded and preserved digitally. After an amendment in 2013, the statute now provides that a video recorded interview of a child made at a child advocacy center is subject to production under Art. 39.14, C.C.P., and Rule 615, Tex. R. Evid. The statute goes on to provide the “[a] court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce a video recording of an interview described by subsection (d), provided that the prosecuting attorney makes the video recording reasonably available to the defendant in the same manner as property or material be made available to defendants, attorneys, and expert witnesses under Article 39.15(d), Code of Criminal Procedure.” Such evidence is considered to be reasonably available to the defendant if, “at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of property or material by the defendant, the defendant’s attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.” Art. 39.15(d), C.C.P.

III.

The defense requests that the court enter an order allowing a court reporter to transcribe the audio recording of the interview of the complainant. Defense counsel will secure the services of a court reporter and the Defendant will bear the expense. The transcription of the audio recording can take place in the District Attorney’s office. Allowing the defense to produce a typed transcription of the audio recording does not provide the video recording to the Defendant and therefore is not a violation of the statute. A transcription of the interview is not a copy, photograph, duplicate or reproduction of “a video recording” of a complainant. An order for transcription of an audio recording of an interview complies with the production requirements of Art. 39.14, C.C.P., and yet does not violate §264.408.

IV.

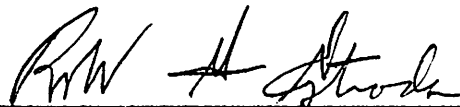
The Defendant believes that the interview of the complainant will contain exculpatory or mitigating evidence which the defendant is constitutionally entitled to have prior to trial pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). In order to effectively use the recordings for impeachment or direct evidence the defense must have ready access to at least a transcription of the audio recording. The proponent of evidence, either substantive or impeaching, must present the evidence in a form that is admissible. *Willlover v. State*, 70 S.W.3d 841, 847 (Tex. Crim. App. 2002); *Jones v. State*, 843 S.W.2d 487, 492-93 (Tex. Crim. App. 1992), cert. denied 113 S.Ct. 1858. In order to bear its burden as the proponent of impeaching or direct evidence from the recording of the complainant, the Defendant must have ready access to the exact audio content of the recordings. Otherwise, the defense may not be able to effectively use the recording to prepare and at trial. Without the ability to effectively use the recordings, the Defendant will be deprived of effective assistance of counsel as guaranteed by the 7th Amendment and Art. 1 §10 of the Texas Constitution, and due process as guaranteed by the Due Process Clause of the 14th amendment and the due course of law clause of Art. 1, §19 of the Texas Constitution.

V

Further, because of the necessity for an expert or experts (many of whom are specialists, charge high fees, and live outside the jurisdiction) to view and evaluate the interview to perform a statement validity analysis and to uncover possibly tainted memory or testimony, it would be very costly and inefficient to have them come to the District Attorney's Office, even if that office could give them open access without regard to a specific time, to view the video and take notes. Further, nothing in the law prevents the State from directly mailing or otherwise sending a video recording to an expert of their own, an imbalance which implicates the due process right to a level playing field in criminal cases. See *Wardius v. Oregon*, 412 U.S. 470 (1973).

WHEREFORE, THE Defendant prays that the court enter an order allowing the defense to have a court reporter transcribe the audio recording of the interview of the complainant that took place at the children's advocacy center, or alternatively, order that the interviews be transcribed by a court reporter working for the court.

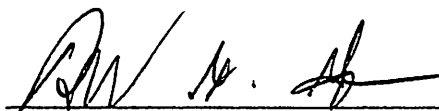
Respectfully submitted,



Robert G. Estrada
State Bar No. 06686400
Law Office of Bob Estrada
1302 14th Street
Wichita Falls, TX 76301-4561
Phone: (940) 723-9749
Fax: (940) 397-0556
Email: estrada@wf.net
Attorney for Defendant
Max Hahn IV

CERTIFICATE OF SERVICE AND CONFERENCE

This is to certify that a true and correct copy of the foregoing Motion for Transcription of Audio Recording was served upon the attorney for the District Attorney for Montague County by e-mail on March 9, 2016. Further, based on prior discussions with the District Attorney, it is my belief that will oppose this motion.



Robert G. Estrada

EXHIBIT “A”

HB 3259

April 19, 2013

Bill Number: TX83RHB 3259

Date: 04-19-2013

ENGROSSED

A BILL TO BE ENTITLED

AN ACT

1
2 relating to the ownership of and access to certain investigation
3 records in child abuse and neglect cases.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 264.0145(a), Family Code, is amended to
6 read as follows:

7 (a) In this section, "case record" means those files,
8 reports, records, communications, audio recordings, video
9 recordings [~~audiotapes, videotapes~~], or working papers under the
10 custody and control of the department that are collected,
11 developed, or used:

12 (1) in a child abuse or neglect investigation; or

13 (2) in providing services as a result of an
14 investigation, including substitute care services for a child.

15 SECTION 2. Sections 264.408(d), (d-1), and (e), Family
16 Code, are amended to read as follows:

17 (d) A video recording of an [~~videotaped~~] interview of a
18 child that is made at a center is the property of the prosecuting
19 attorney involved in the criminal prosecution of the case involving
20 the child. If no criminal prosecution occurs, the video recording
21 [~~videotaped interview~~] is the property of the attorney involved in
22 representing the department in a civil action alleging child abuse
23 or neglect. If the matter involving the child is not prosecuted,
24 the video recording [~~videotape~~] is the property of the department

1 if the matter is an investigation by the department of abuse or
2 neglect. If the department is not investigating or has not
3 investigated the matter, the video recording [~~videotape~~] is the
4 property of the agency that referred the matter to the center. If
5 the center employs a custodian of records for video recordings of
6 [~~videotaped~~] interviews of children, the center is responsible for
7 the custody of the video recording [~~videotape~~]. A video recording
8 of an [~~videotaped~~] interview may be shared with other agencies
9 under a written agreement.

10 (d-1) A video recording of an [~~videotaped~~] interview
11 described by Subsection (d) is subject to production under Article
12 39.14, Code of Criminal Procedure, and Rule 615, Texas Rules of
13 Evidence. A court shall deny any request by a defendant to copy,
14 photograph, duplicate, or otherwise reproduce a video recording, or
15 the audio portion of a video recording, [~~videotape~~] of an interview
16 described by Subsection (d), provided that the prosecuting attorney
17 makes the video recording [~~videotape~~] reasonably available to the
18 defendant in the same manner as property or material may be made
19 available to defendants, attorneys, and expert witnesses under
20 Article 39.15(d), Code of Criminal Procedure.

21 (e) The department shall be allowed access to a center's
22 video recordings of [~~videotaped~~] interviews of children.

23 SECTION 3. This Act takes effect September 1, 2013.

1 Criminal Procedure.

2 (e) The department shall be allowed access to a center's
3 video recordings of ~~(videotaped)~~ interviews of children.

4 SECTION 3. This Act takes effect September 1, 2013.

6 * * * * *

EXHIBIT “B

Letter To Senate Jurisprudence

Committee

May 1, 2013

J. CRAIG JETT

ATTORNEY AT LAW
FOUNDERS SQUARE
SUITE 880
800 JACKSON STREET
DALLAS, TX 75202
(214) 871-4900
(214) 871-7676

FAX (214) 871-7677
EMAIL: jcj@bp-g.com

OF COUNSEL TO
BURLESON PATR & GIBSON

May 1, 2013

Via Fax: 512-463-8336
Ms. Julie Frank
Senate Jurisprudence Committee

Re: House Bill No. 3259

Dear Ms. Frank:

I am a lawyer who practices in Dallas and surrounding counties. My practice, and the rights of my clients, are affected by House Bill 3259. I was told that I could communicate my concerns to you and that you would pass those concerns along to Senator West and the rest of the Senate Jurisprudence Committee.

On its face, HB 3259 purports to update certain provisions of the Family Code to bring it in line with the current technology that is being used to record interviews with complainants in child abuse and neglect cases. While I believe that the Family Code sections to be amended by this bill were originally ill-conceived, I believe the suggested amendments to those provisions in HB 3259 may have unintended consequences that will further skew the "playing field" in the prosecution of these cases to the detriment of fundamental rights of the accused.

As they currently stand, Sec. 264.408(d-1), Family Code and Art. 39.15, C.C.P., prohibit judges from ordering the State to provide defendant's counsel with copies of tape recorded interviews of alleged victims at children's advocacy centers. I believe that the original statutes were passed because lawyers who had received copies of the interviews provided them to their clients, who then misused them. The statutes were an effort to curb these abuses, but have made the investigation and preparation of these cases much more difficult. The statutes allow defense counsel to view such interviews in the offices of the prosecutor or a law enforcement agency, but do not allow defense counsel to have a copy of the interview. This gives one side, the State, unlimited access to the evidence, while limiting the defendant's access and his ability to make use of the recordings in investigation and at trial. See *Willlover v. State*, 70 S.W.2d 841, 846-47 (Tex. Crim. App. 2002) (proponent of recording of interview of child has burden to submit the evidence in admissible form). The rationale supporting the current statute reminds me of the old arguments attempting to justify "separate but equal".

Ms. Julie Frank
May 1, 2013
Page 2

After Section 264.408(d-1), Family Code, was passed, a practice started of lawyers requesting, and judges granting, permission to have a court reporter transcribe the interviews of the children. This allows the defense to have all the time it needs, to at least become familiar with the words (but not demeanor) of the child, and be prepared to impeach prior inconsistent statements with the transcription, or to more quickly locate on the original interview recording, the prior inconsistent statements of the child. This last point assumes the trial judge believes he has the authority to require production of the recorded interview in court for use as impeachment. See *Davis v. Alaska*, 415 U.S.308 (1974).

The current version of Section 264.408(d-1) prohibits duplicating a "videotape" of an interview of a child complainant or witness. The suggested amendment to that section prohibits the duplication of "a video recording, or the audio portion of a video recording". While I think this amendment may not have been intended to prohibit the transcription of the audio portion of a recording, I believe that the wording may be so interpreted. I think there are plenty of judges and prosecutors that are hostile to the idea of providing the defense equal access to evidence and this language would be used to exercise that belief.

I believe that the bill could be clarified by the inclusion of language that would allow a court to grant a motion for transcription, with corresponding authority to prohibit the publication of such a transcription. Another provision should allow a judge to take into possession of the court a copy of the interview so that it would be available for use by the defense at trial or to prepare for trial, while not allowing the defense to have a copy of the interview, but protecting his work product privilege. This would fulfill the intent of the statute, but would allow the court to have more leeway to enter orders that would allow the defense to adequately prepare for trial and protect the defendant's constitutional right to put on a defense and to confront and cross-examine witness against him.

I would be happy to discuss this matter further with you, Senator West, or members of the committee, or to appear before the committee. Thank you for your attention to and consideration of my comments.

Very truly yours,



J. Craig Jett

JCJ/mas

EXHIBIT “C”

HB 3259

Senate Committee Substitute

May 20, 2013

Bill Number: TX83RHB 3259

Date: 05-20-2013

SENATE COMMITTEE SUBSTITUTE

A BILL TO BE ENTITLED

AN ACT

1
25 relating to the ownership of and access to certain investigation
26 records in child abuse and neglect cases.

27 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

28 SECTION 1. Section 264.0145(a), Family Code, is amended to
29 read as follows:

30 (a) In this section, "case record" means those files,
31 reports, records, communications, audio recordings, video
32 recordings [~~audiotapes, videotapes~~], or working papers under the
33 custody and control of the department that are collected,
34 developed, or used:

35 (1) in a child abuse or neglect investigation; or

36 (2) in providing services as a result of an
37 investigation, including substitute care services for a child.

38 SECTION 2. Sections 264.408(d), (d-1), and (e), Family
39 Code, are amended to read as follows:

40 (d) A video recording of an [~~videotaped~~] interview of a
41 child that is made at a center is the property of the prosecuting
42 attorney involved in the criminal prosecution of the case involving
43 the child. If no criminal prosecution occurs, the video recording
44 [~~videotaped interview~~] is the property of the attorney involved in
45 representing the department in a civil action alleging child abuse
46 or neglect. If the matter involving the child is not prosecuted,
47 the video recording [~~videotape~~] is the property of the department
48 if the matter is an investigation by the department of abuse or
49 neglect. If the department is not investigating or has not
50 investigated the matter, the video recording [~~videotape~~] is the

51 property of the agency that referred the matter to the center. If
52 the center employs a custodian of records for video recordings of
53 [videotaped] interviews of children, the center is responsible for
54 the custody of the video recording [videotape]. A video recording
55 of an [videotaped] interview may be shared with other agencies
56 under a written agreement.

57 (d-1) A video recording of an [videotaped] interview
58 described by Subsection (d) is subject to production under Article
59 39.14, Code of Criminal Procedure, and Rule 615, Texas Rules of
60 Evidence. A court shall deny any request by a defendant to copy,
61 photograph, duplicate, or otherwise reproduce a video recording
62 [videotape] of an interview described by Subsection (d), provided
63 that the prosecuting attorney makes the video recording [videotape]
64 reasonably available to the defendant in the same manner as
65 property or material may be made available to defendants,
66 attorneys, and expert witnesses under Article 39.15(d), Code of