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December 14, 2000

Al Jones, County Judge

Commissioner Precinct 1 - Tony Jones  
Commissioner Precinct 2 - Bill Thornton  
Commissioner Precinct 3 - Randy Sims  
Commissioner Precinct 4 - Carey Cauley, Jr.  
300 East 26<sup>th</sup> Street  
Bryan, Texas 77803

Subject: - Requested Agenda Item for December 19, 2000 Meeting  
- Court Reporter for the 272<sup>nd</sup> District Court

Gentlemen:

Presently, the 272<sup>nd</sup> District Court implements an Electronic Recording system to make records of official proceedings. This is done in lieu of utilizing a Certified Court Reporter, the method that is implemented in the vast majority of the courts of record in this State. After having reviewed a substantial amount of information regarding the benefits and drawbacks of the Electronic Recording system, and having considered the benefits and drawbacks of using a Court Reporter, and spending considerable time deliberating on the decision, I have decided to utilize a Certified Court Reporter for making official records of proceedings in the 272<sup>nd</sup> District Court when I take office on January 1, 2001.

Accordingly, I am requesting that this matter be put on the agenda for the December 19, 2000 Commissioner's Court meeting to appropriate the necessary funds to hire a Certified Court Reporter and to provide sufficient funds for a visiting court reporter during any period of time when the Court's Reporter may be absent. Whatever sums have previously been appropriated for this purpose in the budget for either the 85<sup>th</sup> District Court or the 361<sup>st</sup> District Court would be appropriate for the 272<sup>nd</sup> District Court.

**Texas Government Code §52.041, Appointment of Official Court Reporter, provides: (a) An official district court reporter shall be paid a salary set by the order of the judge of the court. This salary is in addition to transcript fees, fees for a statement of facts, and other necessary expenses authorized by law.**

Further, **Texas Government Code §52.051 (a), Compensation of District Court Reporters, provides: (a) An official district court reporter shall be paid a salary set by the order of the judge of the court. This salary is in addition to**

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**transcript fees, fees for a statement of facts, and other necessary expenses authorized by law.**

Therefore, I am asking the Commissioners Court to do what the law requires.<sup>1</sup> So that you all know this is a decision that I have not entered lightly, I have set forth the manner and process of my evaluation below.

## 1. Background

In about May of 2000, Judge John Delaney, the current Judge of the 272<sup>nd</sup> District Court, graciously began involving me in the budget process, recognizing me as the presumptive Judge Elect of the Court since I would be unopposed in the general election, and knowing that three-quarters of the budget for FY 2001 for the Court would be during my tenure. I appreciate Judge Delaney's willingness to have me involved in the front-end of the budget process.

At the time, I expressed to Judge Delaney that my preference would be to utilize a Certified Court Reporter as opposed to continuing with the current Electronic Recording system. Judge Delaney, as you know, is an ardent advocate of the Electronic Recording system, and electronic recording certainly has some advantages. I, on the other hand, had prosecuted several appeals out of the 272<sup>nd</sup> District Court (as well as several other Courts) in both cases that I tried as a lawyer, and in cases where I took over the appeal. My preference for a Certified Court Reporter was the result of some problems with some of the records procured from the 272<sup>nd</sup> District Court.

Judge Delaney encouraged me to keep an open mind in making the evaluation, and to deliberate and consider all of the facts before making a final decision. In honor of his request, I have sought to do an honest job of keeping an open mind about both systems before making a final decision, and undertook, with Judge Delaney's assistance, to procure substantial additional information about both methods.

After having considered all of these things, I have concluded that, while the Electronic Recording system has some advantages, utilizing a Certified Court Reporter who use Computer Aided Transcription is the best and most reliable way of making accurate records.

## 2. Current Situation

The 272<sup>nd</sup> District Court does not presently have a line item in its budget for the salary for a Court Reporter, and the county arguably saves some money as a result of having one less person on the staff. I am also aware that two of the Court's current staff members, the Court's secretary (who also serves as the Court's primary recorder) and the Court's coordinator receive a salary supplement in the approximate amount of \$6,000 per year, which, I understand is compensation for additional

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<sup>1</sup>The performance of a clear statutory duty which is ministerial and nondiscretionary may be directed by the District Court without notice and hearing in the absence of a statutory requirement to the contrary. Section 52.051 does not require the District Judges to provide notice and hearing. *Mays v. Fifth Court of Appeals*, 755 S.W.2d 78, 31 Tex. Sup. Ct. J. 533 (Tex. 1988)

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duties that the two assume by operating the Electronic Recording system. I recognize that, by switching to a Certified Court Reporter, these salary supplements may be eliminated.

From the beginning, I have expressed my ideological view that a loyal county employee ought not to be in fear for his or her job because the elected official boss changes, and have manifested my intention to keep the current staff when I take office on January 1, 2001. My intent is to start day one at square one with each employee, and let time tell as to whether or not each wants to or should continue in their current positions. Yet, I would be naive not to also recognize that the possible elimination of a salary supplement may induce or indeed necessitate that an affected employee may seek employment elsewhere to earn a higher income.

In the cold calculus of the swift and efficient administration of justice and in the related preparation of official records, one arguably ought not to consider the personal needs of a few individuals when determining what is best for the County and the citizenry as a whole. Yet, I could not discount the fact that this change may work some difficulty on the two court staff members that receive this supplement, and it was a factor in my decision. If the Commissioner's Court is of the opinion that the salary supplements should be canceled, I am of the opinion that they should be phased out over a few months since there will likely be additional work to generate records from the Electronic Recording System for records requested for cases heard through the end of this calendar year.

### 3. Accuracy In Records

Since Judge Delaney asked me to seriously consider keeping the Electronic Recording system, I have sought to be more attentive to and more observant of courtroom operations and the manner in which proceedings are recorded. I have been fortunately blessed with much work during this eleven month interval as a lawyer between Judgeships, have tried at least five cases to a jury (as a lawyer), and tried two to a jury as a Special Judge. I have also been involved in numerous other contested matters that required the making of a record.

I have also prepared several appeal briefs in the past few months (I will have completed eight by year's end if my count is correct), two of the appeals arose out of cases which were tried in the 272<sup>nd</sup> District Court. I have handled and prepared numerous appeals in the past, some of which arose out of the 272<sup>nd</sup> District Court, and my former observations have been that the records out of the 272<sup>nd</sup> District Court were not as accurate. Prosecuting an appeal generally involves a comprehensive review of the transcript of the proceedings which is called the Reporter's Record (Recorder's Record in the 272<sup>nd</sup>; it used to be called the Statement of Facts in either case), and the Court's file (which is now known as the Clerk's Record).

Usually, the Reporter's Record is prepared by the Court's Official Reporter, and is prepared in several volumes, double spaced typed. In the 272<sup>nd</sup>, the current practice is to send out copies of the electronic recordings to private transcriptionists, and the record is prepared by a person who was not present at trial.

When speech cannot be clearly understood or discerned by the transcriptionist from the tapes, he or she would simply record the portion as "(inaudible)" or "(indiscernible)." This was troublesome, for this meant that a portion of the actual proceedings were lost forever. In order to make a better, and more objective evaluation, I decided to compare the transcripts in three appeals, two of which were out of the 272<sup>nd</sup>, and one of which was out of the 361<sup>st</sup> District Court. The case appealed out of the 361<sup>st</sup> was a complicated, organized criminal activity (OCA) case which involved five lawyers; two of whom were prosecutors, and three of whom were defense attorneys (and two of these had the same last name of 'Davis'). If ever there was a case that would tax a Reporter's abilities to the extent that there might be some inaccuracies, it would be this OCA case. The reporter in the 361<sup>st</sup> District Court uses Computer Aided Transcription (which I will also require of any

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reporter hired in the 272<sup>nd</sup>). Computer Aided Transcription utilizes an electronic shorthand record machine that translates shorthand notes into rough drafts of English texts.

The OCA was tried in June 2000 in the 361<sup>st</sup> District Court. The official record involved eleven volumes. The first volume was the Clerk's record. The last volume was the Exhibit volume. The remaining nine volumes were actual transcriptions of the proceedings, statements made by the Court, the attorneys, and the testimonies of the witnesses.

In the entire nine volumes of transcribed proceedings, which constituted some 1,288 pages, we found only eight instances where the actual word spoken could not be discerned and which were listed in the record as "(inaudible)" or "(indiscernible)." By way of contrast, I also evaluated the records that were prepared by commercial transcriptionists in a robbery case that was tried before a jury in the 272<sup>nd</sup> District Court (and that resulted in only two volumes of official proceedings transcribed), and in a drug case that was tried before a jury in the 272<sup>nd</sup> District Court (and that resulted in six volumes, including Voir Dire, of official proceedings transcribed).

In three volumes of transcripts from the robbery case, which constituted some 304 pages, we found 45 instances where that actual words spoken could not be discerned and were written as "(inaudible)" or "(indiscernible)."

Additionally, in the entire five volumes of transcripts from the drug case, which constituted some 717 pages, we found 171 instances where the actual word spoken could not be discerned and which were listed in the record as "(inaudible)" of "(indiscernible)."

Therefore, if you evaluate the error ration in tabular form, here is what I found:

Case	Volumes of Transcribed Proceedings	Total Number of Pages Transcribed	Instances of Inaudible or Indiscernible Speech	Average Errors Per Page (expressed as percentage)
<i>State v. Robinson (the OCA case)</i>	9	1,288	8	0.62
<i>State v. Smith (the drug case)</i>	6	717	171	23.85
<i>State v. Nutall (the robbery case)</i>	3	304	45	14.80

Therefore, based on this rough sampling, the error rate of electronic recording is generally more than 20 times greater (or 2000%) when contrasted with computer aided court reporting. Some may argue that a total error rate of 14% to 24% is small enough. However, we should be striving to work toward error free transcriptions, and sometimes an appeal can hinge on the accurate recording of a few words. I should note that the instances of inaudible or indiscernible speech were counted by hand where the parenthetical word appears. After I reviewed the Statements of Facts in the Smith and Nutall cases, I detected numerous other errors that would not be readily apparent to the ordinary reviewer (for example, in Nutall the assistant district attorney is quoted as working for Gill Turner instead of Bill Turner).

I know of a criminal case that was appealed out of the 272<sup>nd</sup> District Court not long ago where the last four minutes of the proceedings in the case could not be transcribed. The absence of the transcript was made a point of error on appeal by the Defendant (ultimately, with what I understand was considerable additional effort, the recordings were enhanced and a record could be

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recreated obviating the point of error). Nevertheless, litigants in a case, whether it be the State in a criminal case, the Defendant in a criminal case, or a Plaintiff or Defendant in a civil case ought have a high degree of assurance that whatever takes place in the trial court is accurately recorded.

#### 4. Delay In Production of Records

As stated above, whenever a record is requested of a proceeding heard in the 272<sup>nd</sup> District Court, copies of the recordings are submitted to a private transcriptionist, a person or entity over which the Court has little control. Furthermore, Court Reporters are required to be certified in a manner that private transcriptionists are not. If the private transcriptionist fails to perform as agreed, just about the only remedy available is to find another commercial entity to prepare the records.

By way of contrast, the Court Reporter is considered an officer of the Court, and is subject to the Court's Orders, which in my view, results in a higher level of accountability generally when it comes to a timely, accurate preparation of a record. To illustrate the control a Court has over its reporter, there have even been situations where Courts have held Court Reporters in contempt for failing to properly discharge their responsibilities (obviously, those cases were egregious and rare).

I believe in the swift administration of justice, and am a strong advocate of quickly bringing cases to trial for the benefit of all parties involved and all of the citizenry. Consistent with that view, I am also of the belief that appeals ought to be prosecuted as quickly as possible, and that doing so results in the best justice for all of the litigants involved and the citizenry as whole.

In at least one case appealed out of the 272<sup>nd</sup> District Court, the preparation of a record from a commercial transcriptionist was not completed until after the defendant had served his full 18 month state jail sentence. Delays of this magnitude are simply unacceptable. In another case (in fact, it was the *Nutall* case cited above), the attorney representing the defendant on appeal had to withdraw from the case (and ultimately handed the appeal over to me for briefing) because a grievance had been filed against him by the defendant because of the delays in filing the brief. The delay in preparation of the brief was caused by the delay in the preparation of the transcript from which the appeal brief could be written.

#### 5. Standards for Court Reporters

By law, Certified Court Reporters are held to certain standards. Under §52.029 (9) of the Texas Government Code, they can be disciplined for unprofessional conduct. Unprofessional conduct for a Court Reporter is defined by Texas Supreme Court Order to include:

(1) Failing to deliver a transcript or statement of facts to a client or court in a timely manner as determined by statute, court order, or agreement;

(2) Producing an inaccurate transcript or statement of facts;

....

Court Recorders and transcriptionists are not subject to the same standards, and I have learned of numerous examples where records were not produced in a timely manner or were substantially inaccurate, and have provided some anecdotal examples from *Ex Parte Blue*, *Benford v. State*, and *Jones v. State*, all cases that involved problems with the records out of the 272<sup>nd</sup> District Court.

#### 6. An Additional Advantage of Computer Aided Transcription

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Recently, I had occasion to preside over a jury trial as a 'Special Judge' (in a case in which I had had substantial pretrial involvement while on the bench in County Court at Law No. 2). The case was a stalking case, and the charging instrument listed several overt acts alleged to have been committed by the Defendant. At the close of all of the evidence, the defense objected to a portion of the Court's proposed charge, contending that one of the overt acts which involved honking a horn had not been proven. The one instance in the trial where the subject came up was when a witness testified that she had heard from someone else about the event, but did not have personal knowledge of the matter.

In order to evaluate the objection, I asked the Court Reporter to perform a word search for "horn" and "honk" so that I could review the testimony. With the aid of her computer, she was able to locate the subject testimony immediately, and read it back to me. If she had had to manually review a short hand tape, or had to listen to recordings, the process would necessarily have taken considerably longer. This added benefit would be particularly useful when a jury certifies to its disagreement about some aspect of a witness' testimony when the testimony about the subject came up on several separate occasions at trial, and the jury needs a 'read back' of the testimony.

#### 7. Anticipated ER Support

I am not presently persuaded that the Court has received nor would receive adequate vendor support that it would need in the future. In June of 2000, the Commissioner's Court met in a 'workshop' session to consider anticipated upgrades to the county's information and data management systems. Many there expressed the sentiment that it would be unwise to have a single source provide the software needed for the upgrades to the counties systems, particularly since the plan considered meant that the vendor would keep and maintain the 'source' code which, in turn, meant that the county would necessarily be involved with the vendor at any time in the future when software revisions were necessary. In other words, such a concept would limit the amount of reconfiguration that our own CNS department could perform 'in house.'

At the meeting, Judge Delaney made a compelling argument against the proposal and used, anecdotally, a situation where the 272<sup>nd</sup> District Court could not get prompt support for maintenance of the digital Electronic Recording system from the distributor out of Houston. If memory serves correctly, he expressed that he was thankful that he had the old tape system to use as a back up.

I am very leery of having a Court's recording system so heavily reliant on a single product vendor, on a handful of freelance transcriptionists, and on a few people that are capable of operating the equipment (presently, two Court staff members). Judge Delaney has pointed out to me the advantages of having a second staff member trained to operate the ER equipment, and the fact that if the Court's regular recorder is out, the second staffer can step in and handle the duty. This is true, but there are limits to this benefit.

Consider this analogy: the Space Shuttle Orbiter has numerous systems with built-in, multi fault tolerance. The Electrical Power System contains three fuel cell power plants, each of which can operate independently, and which provides multi fault tolerance. Similarly, there are three separate auxiliary power units, three hydraulic pumps and three hydraulic systems. Each auxiliary power unit and its fuel system are identical but independent systems that are not interconnected.

**Likewise, the Orbiters avionics are designed to withstand multiple failures through redundant hardware and software programs managed by the complex of five computers; this arrangement is called a fail-operational/fail-safe capability. Fail-operational performance means that, after one failure in a system, redundancy management allows the vehicle to continue on its mission. Fail-safe**

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means that after a second failure, the vehicle still is capable of returning to a landing site safely.

The multi fault tolerant systems in the Orbiter are numerous. On the contrary, the ER system in the 272<sup>nd</sup> District Court is 'one fault tolerant'. In other words, if one of the trained system operators is out sick, Court operations are not interrupted. If both are out, there would be no one available to operate the equipment, and Court operations would stop (of course, an independent CSR could be brought in to transcribe the proceedings in the customary manner).

By way of contrast, and having experience as Judge of County Court at Law No. 2, I had no problem finding substitute Court Reporters when critically necessary, and there were many occasions when a Court reporter from one Brazos County Court would fill in on an as needed basis for a reporter in another Court.

8. Anticipate need for additional staffing

I, along with Judge J. D. Langley, are seeking to have the jurisdiction of the 272<sup>nd</sup> District Court and 85<sup>th</sup> District Court expanded to include misdemeanor jurisdiction, and to bring them in line with the 361<sup>st</sup> District Court. Having formerly presided over a Court with misdemeanor cases, I offer two observations: the misdemeanors are more numerous, and the cases are 'higher maintenance' for the staff. Misdemeanor defendants are more likely to be first time offenders, and are far more likely to represent themselves in their criminal case. This necessarily results in a larger number of calls to the Court from *pro se* litigants and their family members.

The current secretary of the 272<sup>nd</sup> District Court is also its recorder. When Court is in session she is not at her desk, but is in Court. This means that the Court Coordinator has to handle the phone calls or they will simply go unanswered, which takes her away from her primary job... a job which will expand with expanded jurisdiction.

9. Conclusion

In light of all the foregoing, and in light of the statutory authority and inherent power that a Court has to provide for the preparation of the official record of its own proceedings, please ensure that sufficient funds are appropriated for the hiring of an official court reporter. My intent is to conduct interviews during the week between Christmas and New Year's Day, with an aim toward having the person begin work on January 2, 2001.

Thank you for your prompt consideration of this matter.

Sincerely,

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Rick Davis  
Judge Elect, 272<sup>nd</sup> District Court

RD/ed

cc:

The Honorable J. D. Langley, District Judge 85<sup>th</sup> District Court  
The Honorable John Delaney, District Judge 272<sup>nd</sup> District Court  
The Honorable Steve Smith, District Judge 361<sup>st</sup> District Court  
The Honorable Randy Michel, Judge, Brazos County Court at Law No. 1  
The Honorable Jim Locke, Judge, Brazos County Court at Law No. 2  
The Honorable Bill Turner, District Attorney  
The Honorable Jim Kuboviak, County Attorney