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Jefferson County court-video failures cause trials, hearings to be lost

By Jason Riley • jriley@courier-journal.com • September 3, 2010

Nearly three months after defense attorneys and prosecutors held a suppression hearing in the Cecil New murder case, they had to do the whole thing all over again recently — calling in the same detective, asking her the same questions and spending more than an hour re-creating the record.

The reason?

Jefferson Circuit Court's digital audio recording equipment failed to properly record the first hearing in Judge Judith McDonald-Burkman's courtroom, capturing video, but no sound.

In fact, the Jefferson Audio Video System, or JAVS, has failed to record audio in several courtrooms, meaning dozens, and perhaps hundreds, of hearings have been silently recorded, with no way for attorneys, defendants or victims to review exactly what was said.

In McDonald-Burkman's courtroom, the audio went unrecorded for more than two weeks in May without anyone knowing.

In Judge Charles Cunningham's courtroom, about a month of proceedings were recorded without audio last fall, and is being cited as grounds for an appeal of a jury conviction in an assault and unlawful imprisonment trial.

In another instance, Judge Susan Schultz Gibson declared a mistrial in a 2008 robbery case when she learned the audio of the testimony had not been recorded.

And Judge James Shake said he faced a possible retrial after an entire criminal trial was lost in the last year.

"It's ridiculous," Shake said. "The record is crucial. It's the most crucial aspect of what we do."

Some judges are fuming about the many problems with the digital system.

"This is a nightmare," McDonald-Burkman said during a hearing after the testimony was lost in the high-profile New case, in which the defendant is accused of killing 4-year-old César Ivan Aguilar-Cano. "... It's been an issue with every court."

Despite the judges' frustration, the Administrative Office of the Courts, which runs Kentucky's court systems, said recently that it did not know of any recording problems in Jefferson Circuit Court, other than the New case.

Charles Byers, the AOC's chief information officer, said in an interview that after he learned of problems in that case, he asked his staff and JAVS company officials to check for similar failures and found none. And he said Jefferson Circuit judges he met with last month about the recording equipment never mentioned other hearings lacking audio.

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"If someone had told me they had lost a month's worth of recording, my hair would have caught on fire," he said, adding that while JAVS had no explanation for the lost audio in the New case, "we're holding their feet to the fire to find out what happened."

The JAVS office in Louisville did not return phone messages seeking comment.

However, several judges and clerks said they have repeatedly notified either the AOC or JAVS about the problems.

Carla Kreitman, Jefferson County's chief court administrator, said "there has definitely been communication" with the AOC and JAVS over many concerns, chiefly the loss of audio.

As a result of the problems, McDonald-Burkman has started using a court reporter — a recording system last used on a regular basis in Jefferson County in the 1980s.

An AOC spokeswoman said in an e-mail that JAVS has provided a proposal to upgrade the system in Jefferson County to its current version at a cost of about \$1.1 million, which would include a backup recorder in each courtroom.

"Given our budget issues, we are planning to implement the upgrades as we can, based on need," Jamie Ball said.

Byers said the AOC may prioritize the upgrade for courts having the most problems.

In the meantime, Jefferson judges are having their staffs check every morning to ensure the sound is working, but there is no assurance it will work all day. Judges also complain the existing system — even when it works — makes it difficult for jurors to have testimony played back for them.

Judge Audra Eckerle said she has a capital murder case that stalled and could have ended in a mistrial because of the difficulties in replaying

testimony for jurors.

"It's a huge problem," she said. "It should be easier to use, but it's not."

So far, the newspaper has found only one trial that is being appealed because of improper recording.

Gregory Harper was convicted in September of assault second-degree and unlawful imprisonment, but his attorney asked for a new trial in part because the audio failed.

Cunningham, who tried to re-create the record with notes he had taken during trial, denied the request.

"Obviously, at least as far as the recording of events is concerned, Mr. Harper got a less than perfect trial. Nonetheless, the court believes he got a fair trial," he wrote last month.

Some judges acknowledged the system has its benefits over the old court-reporter system.

Judge Olu Stevens said he recently returned from a conference where judges from across the nation were complaining about problems with court reporters, and the time it took to get transcripts back from one day of trial.

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“When you think about it from that angle,” he said, “I’m very appreciative we can go into the court and hit a button and record the proceeding.”

Reporter Jason Riley can be reached at (502) 584-2197.



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Maggie McGrath, secretary for Judge Audra Eckerle, sits in the judge’s chair as she checks out the court video equipment before court starts. McGrath does a sound check and examines the discs to be sure recording occurred the day before. (By Michael Hayman, The Courier-Journal)

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