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January 4, 2023

Via email

Sandra F. Haines, Esq., Reporter
Standing Committee on Rules of Practice and Procedure
Judiciary A-POD
580 Taylor Avenue
Annapolis, MD 21401
rules@mdcourts.gov

Re: Written Comments on the Two Hundred and Thirteenth Report and Proposed Rules Changes by the Standing Committee on Rules of Practice and Procedure, Submitted on Behalf of Eighteen News Organizations

Dear Ms. Haines:

On behalf of 18 news organizations that regularly report on the courts and criminal justice issues in Maryland and elsewhere,¹ we respectfully submit the following comments on the Two Hundred and Thirteenth Report and Proposed Changes to Rules by the Standing Committee on Rules of Practice and Procedure (the “Rules Committee”). For the reasons below, the Supreme Court of Maryland should reject these proposed changes to the Maryland Rules and preserve the State’s role as a leader in judicial access and transparency.

First, Maryland Rule 16-504 does not need to be changed. Rule 16-504 currently provides public access to recordings of circuit court proceedings and fosters transparency in Maryland courts, while expressly providing appropriate safeguards to shield properly designated nonpublic aspects of criminal proceedings. It promotes public confidence in the

¹ These comments are submitted on behalf of American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Baltimore Sun Media, CBS Broadcasting Inc. o/b/o CBS News and WJZ-TV, Baltimore, The Daily Record, Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company o/b/o WMAR-TV, Gannett Co., Inc., the Maryland-Delaware-D.C. Press Association, Inc., National Public Radio, Inc., NBCUniversal Media, LLC d/b/a NBC News, The New York Times Company, POLITICO LLC, Pro Publica, Inc., Serial Productions, LLC, Sinclair Broadcast Group, Inc. o/b/o WBFF-TV, Vox Media, LLC, and WP Company LLC, d/b/a The Washington Post.

judiciary and assists the press in effectively reporting on the court system and the important cases that proceed through it.

The Committee’s proposed Rules changes are a reaction to the U.S. District Court for the District of Maryland’s recent ruling in *Soderberg v. Carrión*, which concluded that Section 1-201 of the Criminal Procedure Article of the Maryland Code (the “Broadcast Ban”) is facially unconstitutional under the First Amendment “to the extent that it prohibits the press and public from broadcasting ‘lawfully obtained audio or video recordings of criminal proceedings that occurred in open court.’” --- F. Supp. 3d ---, 2022 U.S. Dist. LEXIS 222645, at *4 (D. Md. Dec. 9, 2022). Prior to that decision, journalists could be held in contempt of court if they published audio of public criminal proceedings that they had obtained directly from the courts.

In 2021, undersigned counsel represented National Public Radio, Inc. (“NPR”) in an as-applied challenge to the same provision that *Soderberg* later invalidated. In that case, the court enjoined the State from enforcing the law against NPR over a then-upcoming episode of the public broadcaster’s *Embedded* podcast. See *NPR, Inc. v. Klavans*, 560 F. Supp. 3d 916 (D. Md. Sept. 15, 2021) (granting preliminary injunction); 1:21-cv-02247-RBD, ECF No. 19 (D. Md. Sept. 21, 2021) (granting permanent injunction).

Because of that ruling, NPR was able to tell a fuller story of the victims who survived the June 2018 mass shooting at the *Capital Gazette*.² The audio recordings of defendant Jarrod Ramos’ trial and sentencing for the murder of five journalists was invaluable to this reporting. That audio included powerful victim-impact statements made in court by survivors and a stirring observation by the circuit court judge, the Honorable J. Michael Wachs, just before he sentenced Ramos, that “[t]he defendant did not get the final say. The First Amendment and the community got the final say.” See Episode at 28:58-30:09.

The amicus brief that the Reporters Committee for Freedom of the Press and twenty three media organizations filed in the U.S. Court of Appeals for the Fourth Circuit when the *Soderberg* case was pending before that court noted numerous other examples of impactful journalism that made use of publicly-available recordings of criminal proceedings:

In Maryland alone, recordings of criminal proceedings have played a significant role in acclaimed podcasts such as *Serial* and *Undisclosed*, as well as the documentary *The Case Against Adnan Syed*. [Susan Simpson, *The Unlikely*

² The Court can listen to the October 14, 2021 episode of *Embedded* (the “Episode”) at <https://www.npr.org/2021/10/14/1046095544/capital-gazette-all-of-a-sudden-its-different>.

Role of True Crime Podcasts in Criminal Justice Reform, Quartz (Oct. 14, 2017), <https://perma.cc/8KX2-U7TP>.]³

The appeal of these podcasts and documentaries extends beyond mere entertainment. As a host for *Undisclosed* noted: “[T]he most compelling true crime documentaries have the ability to shed new light on inequalities in the U.S. justice system—bringing attention to issues of race, religion, and socio-economic class, while reigniting audiences with an intimate discussion of old cases.” [*Id.*] Reporting of this type has even succeeded in prompting courts to revisit convictions through the discovery of new evidence. See Jessica Ferri, *9 True-Crime Documentaries That Changed The Case Forever*, The Lineup (Aug. 1, 2018), <https://perma.cc/GU6J-8CSZ>.

. . . Indeed, many of the most successful podcasts and documentaries covering criminal trials have relied heavily on audio recordings of criminal proceedings. For example, the first season of investigative podcast *Serial* used audio from a Maryland criminal courtroom extensively to “effectively call[] upon the audience to question fairness in the criminal justice process, opening the door for questions of biases, witness manipulation, prosecutorial misconduct, ineffective assistance of counsel, and questionable evidence.” Simpson, *supra*; see also Lillian Reed, *Why Has Maryland Court Trial Footage of ‘Serial’ Subject Adnan Syed Rarely Been Broadcast?*, Baltimore Sun (Mar. 12, 2019), <https://perma.cc/UXL5-2VNA>.

Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 23 Media Organizations, *Soderberg v. Carrión*, No. 20-1094, ECF 39-1, at 7-9 (Apr. 13, 2020).

As the United States Supreme Court has recognized, “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). The Committee’s proposed Rules changes would imperil such important journalism.

³ As a result of the attention brought to the case by *Serial* and other reporting efforts, Adnan Syed’s conviction was overturned and the charges against him were dropped. See Daniel Victor, *Timeline: The Adnan Syed Case*, The New York Times (Oct. 11, 2022), <https://www.nytimes.com/article/adnan-syed-serial-timeline-serial.html>.

Second, the proposed Rules changes represent a regrettable retreat from transparency in Maryland at a time when courts around the country are making significant strides toward transparency, aided by improving technology that allows them to do so seamlessly. *See, e.g., Judicial Conference Adopts Transparency Measures*, U.S. Courts (Mar. 15, 2022) <https://www.uscourts.gov/news/2022/03/15/judicial-conference-adopts-transparency-measures> (federal judiciary’s policymaking body “agreed to expand the scope of its audio streaming pilot project” to inform its policies); *Live Oral Argument Audio*, Supreme Court of the United States, https://www.supremecourt.gov/oral_arguments/live.aspx (providing for livestreaming of U.S. Supreme Court arguments); *Audio Recordings of Court Proceedings Now Available for Purchase*, Conn. Judicial Branch, https://jud.ct.gov/HomePDFs/Audio_Recordings_Court_Proceedings.pdf (providing public access to public judicial proceedings, effective Nov. 1, 2018).

Maryland courts have long been at the vanguard of this trend toward transparency, which among other things serves the important purpose of affirming public trust in the judicial process itself. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570-72 (1980) (“To work effectively, it is important that society’s criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.”); *id.* at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”). Maryland courts should not retreat from their leadership in transparency. Continued access to public criminal court proceedings under the current Rule 16-504, including through enabling more thorough and accurate journalism, serves the public interest. “[T]he function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.” *Cox*, 420 U.S. at 492; *see also Soderberg*, 2022 U.S. Dist. LEXIS 222645, at *41 (“[O]penness and publicity are ‘preservative – not deleterious – of fairness.’” (quoting *Klavans*, 560 F. Supp. 3d at 927)).

Third, as a practical matter the proposed Rules changes would be ineffectual at remedying the alleged harm because they would restrict access to recordings of criminal proceedings that are already *open* to the public. As the court noted in *Soderberg*, with the Broadcast Ban, “the State [sought] to forestall the harm that may result from the publication of sensitive information that the State itself has disclosed.” 2022 U.S. Dist. LEXIS 222645, at *4. Likewise, even if the proposed Rules changes were implemented, journalists and others still could freely report on witness identities, verbatim witness testimony, and any other public aspect of a criminal proceeding. The public, however, would lose out on hearing for themselves witness testimony, legal advocacy, and other important aspects of criminal courtroom proceedings that go beyond what a cold transcript can convey.

The court’s observations about the Broadcast Ban in *Soderberg* thus apply with equal force here: “It does precious little to protect witnesses against intimidation, harassment, and violence, as it does not prevent the widespread publication of their names, their images, and the verbatim content of their testimony. It is far more expansive than necessary to achieve

its desired ends, as it restricts the publication of official recordings in all criminal proceedings held in trial court – even where there are no manifest concerns that a subsequent broadcast might undermine the fairness of the trial or endanger its witnesses.” *Id.* The proposed Rules changes thus do not, and cannot, forestall the injury the Rules Committee seeks to prevent.

Fourth, Maryland courts have proper safeguards in place to prohibit the release of recordings of nonpublic court proceedings and properly place the burden on the State to limit access on a proceeding-by-proceeding basis. Specifically, Rule 16-504(g) already provides that courts “shall direct that appropriate safeguards be placed” on portions of recordings that “the court finds should and lawfully may be shielded from public access and inspection.” *See also* Md. Rule 16-504(h)(1)-(2), (i)(1), (j)(2). The Maryland Rules thus provide for proceedings to be sealed as permitted by law and ensure that confidential proceedings remain shielded from public disclosure. They strike a careful balance between facilitating transparency while safeguarding sealed proceedings, as opposed to the blunt tool of this proposed restriction on access to (and use of) recordings of public criminal proceedings.

Fifth, and finally, the proposed Rules changes should not be considered on such an urgent basis. The Rules Committee has asked the Court to adopt its proposed Rules changes “on an interim and emergency basis,” rather than waiting to include them as part of “a much larger Report that the Committee intends to file within the next three or four weeks.” The Supreme Court of Maryland Standing Committee on Rules of Practice and Procedure, *Two Hundred and Thirteenth Report*, at 1-2 (Dec. 14, 2022) (the “213th Report”). The Rules Committee has not offered any reason for such an expedited process beyond stating that it is prompted by the decision in *Soderberg*. *Id.* But the Office of the Attorney General, which represents the Honorable Audrey J.S. Carrión and the other defendants in that matter, has not moved for a stay pending appeal (or even noticed an appeal). The State’s decision not to seek such relief belies the notion that the *Soderberg* ruling amounts to an emergency.

Especially because the proposed Rules changes would curtail *public* access to court proceedings, the Rules Committee should not have shrunk the timeframe for *public* input and deliberation.⁴ At a minimum, therefore, the Court should table this proposal, permit

⁴ As a practical matter, we are also concerned that the proposed Rules changes do not appear to provide for additional court personnel or improved technology to facilitate the provision of audio or audio-visual recordings of criminal proceedings within court facilities, as would be required by Rule 16-504.1(a)(1)(B). *See* 213th Report at 2 (stating that “no one may obtain a copy of an electronic recording of a criminal proceeding” and noting that members of the public still may “listen[] to or view[] such a recording that is not lawfully shielded”). In the event of a high-profile criminal proceeding, a clerk’s office may face significant interest in the recording, and it is not clear how this would be accommodated in a manner that does not severely impede public access.

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additional time for public comment, and address the proposed Rules changes on a non-emergent basis.

For each of these reasons, we respectfully urge the Court to reject the proposed Rules changes, which would roll back the judiciary's efforts at transparency, reduce the public's awareness and understanding of activity in the courts, and erode public confidence. Maintaining the current Rules will result in more effective journalism, a better-informed public, and greater faith in the court system – and will not negatively impact the integrity of criminal trials or witnesses' willingness to testify.

We sincerely thank you for taking the time to consider these comments, and we look forward to addressing the Court on these points at the hearing set for January 6, 2023.

Very truly yours,

BALLARD SPAHR LLP

A handwritten signature in blue ink, appearing to read "Maxwell S. Mishkin".

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