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Journalists win as 4th Circuit orders redo in challenge to Md. trial-tape ban

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In Maryland, the state court system is required by statute to record most criminal proceedings. Some hearings and trials are just audiotaped. Others are recorded on video.

Maryland state law also permits members of the public to obtain these electronic records. If you send a written request to the court and agree to pay copying costs, you're entitled to a copy of the tapes of most public criminal proceedings.

But if you try to re-air the official tape you have legally obtained from the Maryland court system – if, for instance, a journalist wants to include tape in a podcast or a documentary or an activist wants to play them at a community meeting – you face contempt sanctions, including the possibility of jail time. Sanctions are not a merely hypothetical threat, either. Since 2016, Maryland court officials have warned journalists at least three times that they risked contempt for airing courtroom audio.

Does that make sense? If you try to report accurately on a criminal proceeding, using an official record of the proceeding obtained directly from the court system, you could end up in jail?

The 4th U.S. Circuit Court of Appeals has doubts about that – and its decision on Tuesday in Soderberg v. Carrion, will force Maryland to prove that its ban on the re-airing of recordings of criminal proceedings is carefully crafted to serve a compelling state interest. To use 1st Amendment lingo, the 4th Circuit ruled that Maryland's prohibition must be evaluated under the stringent strict scrutiny standard for government restrictions on speech.

Journalists and activists, including two Baltimore-area reporters working on a documentary about the city's corruption-ridden Gun Trace Task Force, brought a 1st Amendment challenge to the Maryland ban in 2019. In 2020, U.S. District Judge Richard Bennett of Baltimore dismissed their suit. Bennett concluded that despite U.S. Supreme Court protection for the publication of lawfully obtained information about court proceedings, members of the press and the public do not have an unfettered 1st Amendment right to broadcast criminal proceedings.

Bennett compared Maryland's so-called broadcast ban – which prohibits the live broadcast of criminal cases as well as the re-airing of taped records of hearings and trials – to the federal rules

of criminal procedure, which include a rule barring the broadcast of trials. That rule has been upheld by federal appellate courts outside of the 4th Circuit.

Bennett evaluated the Maryland ban under intermediate scrutiny because, in his view, the state's speech restrictions were not based on content. He concluded that the law served a compelling state interest in assuring fair trials and did not preclude alternative ways for the public to find out what happened during criminal trials, such as written transcripts or re-enactments based on the written record.

On appeal, plaintiffs lawyers from Georgetown Law's Institute for Constitutional Advocacy and Protection and Maryland Volunteer Lawyers for the Arts argued that Maryland and the trial judge got things exactly backward: The way to ensure fairness for criminal defendants, they said, is to encourage public access to and truthful reporting on the proceedings. The Supreme Court, they argued, has said as much in decisions including 1975's Cox Broadcasting Corp v. Cohn and 1979's Smith v. Daily Mail Publishing Co.

"The notion that public scrutiny of the judicial process would undermine – rather than enhance – the fairness of criminal trials inverts the very constitutional interests that Cox Broadcasting, Daily Mail, and their progeny aim to protect," the brief said. (The plaintiffs got amicus support from the Reporters Committee for Freedom of the Press, Floyd Abrams Institute and Cato Institute, which emphasized that the plaintiffs want to re-air tapes of concluded proceedings, not broadcast live trials.)

The Maryland AG's office argued that criminal trials are not Broadway shows. Jurors and witnesses, including potential witnesses, behave differently when trials are broadcast, the Maryland brief said. That concern is multiplied, the AG argued, "when jurors learn that their face, conduct and voice may appear not just on the evening news, but in perpetuity through films, podcasts, and on-demand streaming services."

Maryland's counsel, Steven Sullivan of the AG's office, faced tough questions from the 4th Circuit panel, Judges Robert King, Pamela Harris and Allison Rushing, at oral arguments last January. It is the state, Rushing noted, that decided to record criminal proceedings on audio and videotape and to make those tapes available to members of public on request. So how can the state argue that materials it provides publicly cannot be shared by those who have legitimately obtained them? (Sullivan said the state was attempting to balance the interests of the public and criminal defendants.)

King and Harris both pressed Sullivan on the Supreme Court's holding in Daily Mail that West Virginia could not punish journalists for publishing truthful information they legally obtained about a criminal case. Sullivan said that the internet has heightened privacy concerns for witnesses and jurors. The court system's highest interest, he said, is in fair, truthful proceedings. The state's broadcast ban, he said, is tailored to serve that interest.

The 4th Circuit decision will require the AG's office to show just that. The appeals court ruled that Supreme Court precedent from Cox and Daily Mail compels the strict scrutiny test. Under that precedent, the appeals court said, Maryland cannot justify punishment for members of the public who re-broadcast recordings they obtained lawfully unless the state can show such punishment is necessary to "further a state interest of the highest order."

The Maryland AG's office said it was reviewing the decision and had no additional comment.

Nicolas Riley of Georgetown, who argued the case for the plaintiffs, predicted by email that Maryland will struggle to meet the strict scrutiny test. “We don't see how the state can show any harm stemming from the dissemination of recordings that simply memorialize proceedings that took place in open court,” he said. “Dozens of jurisdictions around the country allow the public to create or obtain recordings of public court proceedings ... and those jurisdictions haven't suffered any adverse consequences.”

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