

The Washington Post

Judges hear arguments over Md. law barring broadcast of audio from court hearings

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Jan. 28, 2021

Attorneys representing a group of journalists and community organizers argued before an appeals court Thursday that a decades-old Maryland statute barring the broadcasting of criminal court proceedings violates the First Amendment.

A three-judge panel of the U.S. Court of Appeals for the 4th Circuit heard nearly an hour of arguments in which the plaintiffs' attorneys pushed back against the state of Maryland's solicitor general, who argued that the courts had a duty to limit third-party publication of audio or video recordings to protect the integrity of witness testimony.

Attorney Nicolas Riley, with Georgetown Law's Institute for Constitutional Advocacy and Protection, argued it is illegal for the court to dictate how publicly available information is used once it is in the hands of the public.

The case began in May 2019, when the Georgetown institute filed a lawsuit against the administrative judges and two court reporters in Baltimore and Prince George's County arguing a violation of due process and the First Amendment. The plaintiffs — two journalists, three community organizations and a court advocate — argued that a “controversial” state law enacted in 1981 places unconstitutional limitations on their ability to share raw audio or video of criminal court proceedings, even though the recordings were legally obtained from the court.

For the journalists, Brandon Soderberg and Baynard Woods, that meant fearing they'd be held in contempt of court if they used court-distributed audio and video of Baltimore City Circuit Court proceedings in an upcoming documentary about the police department's Gun Trace Task Force.

For the community groups — Open Justice Baltimore, Baltimore Action Legal Team and Life After Release — it means potentially breaking the law for sharing criminal court audio online during advocacy events or in podcasts seeking to educate the public and improve court transparency.

In the case of Qiana Johnson, a legal advocate in Prince George's who founded Life After Release and a courtwatch program, it meant being barred from publishing recordings of herself addressing the court on behalf of criminal defendants.

The lawsuit came after court officials warned the producers of the popular podcast “Serial” that they could be held in contempt of court for broadcasting court proceedings and after the plaintiffs sent multiple letters to the administrative judges in Baltimore and Prince George's County seeking clarity on the Maryland law. None were answered, the lawsuit alleges.

The state of Maryland filed a motion to dismiss, and U.S. District Judge Richard D. Bennett agreed to throw out the case, writing that the plaintiffs did not make a clear First Amendment argument.

The plaintiffs appealed to the 4th Circuit in March, asking only for a review of the constitutionality of the Maryland statute under the First Amendment and dropped the court reporters from the suit. Amicus briefs were soon filed in support by the Cato Institute, the Floyd Abrams Institute for Freedom of Expression, the Reporters Committee for Freedom of the Press and 23 local and national media organizations, including The Washington Post.

In court Thursday, Riley was joined by Eugene Volokh, a UCLA First Amendment law professor. They argued that, in dismissing the case, the district court was wrong to equate Maryland's broadcasting law with other broadcasting laws upheld by the other courts. Those laws, Riley argued, involved the broadcasting of material the court had not already released.

Maryland's law, however, tries to regulate the publication of information legally released by the court and already in the public sphere. It does not make clear the distinction between a member of the public live-recording a hearing and a member of the public broadcasting a recording made by the court and released with its permission.

The state's argument in upholding the statute has been that journalists, community organizers and members of the public do not need the audio or video recordings because they have the written transcripts, which they can use to produce their own reenactment or voice-over.

The plaintiffs' attorneys argued in court documents and on Thursday that this option was not sufficient. Hearing the "tone, inflection, emotion and pauses" in a court participant's voice can be just as critical to understanding a court proceeding as dissecting the words they spoke, Riley told the panel.

Much of the state's argument, made by Maryland Solicitor General Steven Sullivan, hinged on a 2008 study by the Maryland judiciary that cited data from decades prior showing that media coverage of criminal proceedings can influence the behavior of court participants, including testifying witnesses.

Sullivan told the panel of judges that even the knowledge that their words could later be the "subject of the next successful podcast" could make witnesses "think twice" about testifying at trial.

The Internet, he argued, makes it even more critical to uphold the broadcasting limitations.

The judges on the panel — Robert King, Pamela Harris and Allison Rushing — are expected to issue a ruling within the coming months.