

INTRODUCTION

1. For years, the Maryland Court of Appeals has sought to ensure the openness of the judiciary by making audio recordings of all trial-court proceedings available to the public. In 2016, the Court reaffirmed its commitment to that goal by re-codifying the public’s “Right to Obtain [a] Copy” of trial-court recordings in Maryland Rule 16-504(h). That Rule now expressly provides that the custodian of such recordings in every circuit “shall make a copy of [an] audio recording . . . available to any person upon written request.”

2. The Court of Appeals has also expressly guaranteed the public’s “Right to Listen to and View” trial-court recordings in Maryland Rule 16-504(i). Under that provision, the authorized custodian of such recordings in every circuit “shall permit [any] person to listen to and view the recording” upon written request.

3. This case arises from the Charles County Circuit Court’s failure to follow those Rules. Relying on an administrative order that predates Rule 16-504, court officials—as a matter of local policy—entirely refuse to make copies of audio recordings available to members of the public. But a *local* administrative order cannot override a *State* Rule—especially one that confers substantive rights upon the general public. Moreover, the order that Respondents have cited remains shrouded in mystery: the Circuit Court has not posted the order publicly; court officials do not even know why it was issued; and they are unable to explain what purpose (if any) it presently serves.

4. To make matters worse, court officials regard the ability to listen to recordings not as a right guaranteed by the Maryland Rules, but as a “courtesy” extended only to practicing attorneys. This position disregards the Court’s clear-cut obligations under state law.

5. Petitioners are a close friend and family member of the late Charles Edret Ford, who spent over six decades in prison following a conviction that this Court vacated in 2015. Because they had so little time with Mr. Ford after he regained his freedom, Petitioners are seeking recordings of his post-conviction proceedings, which they hope to use to keep his memory alive.

6. Respondent Zrioka’s refusal to comply with Rules 16-504(h) and (i) has effectively annulled those statewide guarantees within Charles County. Mandamus relief is therefore necessary in order to restore the transparency that the Rules are meant to foster.

JURISDICTION

7. The Circuit Court for Charles County has jurisdiction over this mandamus action under Maryland Rule 15-701 and § 1-501 of the Maryland Code, Courts & Judicial Proceedings.

8. This Court is authorized to issue both mandamus and declaratory relief, *see* Md. Code, Cts. & Jud. Pro. § 3-409(c), and may issue declaratory relief in this matter regardless of whether it also issues mandamus relief, *see id.* §§ 3-406, 3-409(c).

FACTUAL AND LEGAL BACKGROUND

A. Maryland Rule 16-504

9. Maryland Rule 16-503(a) provides that all circuit-court “proceedings before a judge in a courtroom shall be recorded verbatim in their entirety.” Many circuit courts in Maryland, including the Charles County Circuit Court, comply with Rule 16-503(a) by recording all judicial proceedings electronically.

10. The public’s right of access to those electronic recordings is governed by Rule 16-504. The Rule contains several subsections delineating the varying tiers of access to audio and video recordings and the limited restrictions that courts may place on that access.

11. This case concerns two subsections of Rule 16-504. The first, subsection (h), is entitled “Right to Obtain Copy of Audio Recording.” That subsection provides, in relevant part:

Generally. Except (A) for proceedings closed pursuant to law, (B) as otherwise provided in this Rule, or (C) as ordered by the court, the authorized custodian of an audio recording shall make a copy of the audio recording or, if practicable, the audio portion of an audio-video recording, available to any person upon written request and, unless waived by the court, upon payment of the reasonable costs of making the copy.

Md. Rule 16-504(h)(1).

12. The second subsection at issue, subsection (i), is entitled “Right to Listen to and View Audio-video Recording.” That subsection provides, in relevant part:

Generally. Except for proceedings closed pursuant to law or as otherwise provided in this Rule or ordered by the Court, the authorized custodian of an audio-video recording, upon written request from any person, shall permit the person to listen to and view the recording at a time and place designated by the court, under the supervision of the custodian or other designated court official or employee.

Md. Rule 16-504(i)(1).

B. The Court Recordings at Issue

13. Petitioners in this case, Andrea Conte and Angela Nivens, seek to obtain audio recordings of the same proceedings: the post-conviction hearings of the late Charles Edret Ford. Mr. Ford, an African-American man, served 64 years in prison for a murder that he insisted he did not commit—and for which he received a life sentence from an all-white Charles County jury in 1952. He was finally released in 2016, at age 84, following a ruling from this Court that his conviction violated due process. Mr. Ford spent more time in prison than anyone in the history of the State of Maryland, and his sentence was the eleventh longest served in all of recorded history.

14. Petitioner Nivens is Mr. Ford's great-niece. Due to Mr. Ford's prolonged confinement, Ms. Nivens did not even know that he existed until late 2014. She connected with Mr. Ford and grew closer to him as the months went by, until his passing in August 2018. Ms. Nivens wishes to obtain audio recordings of her great-uncle's proceedings in order to help preserve his memory. Hearing Mr. Ford's voice once more would be especially meaningful to Ms. Nivens's young daughter, who has

developed an interest in civil rights ever since learning how her own family has been deeply affected by America's history of racial injustice.

15. Petitioner Conte is an independent journalist who has been researching Mr. Ford's case for several years. In the course of doing so, Mr. Conte developed a close bond with Mr. Ford and provided him essential support as he transitioned back into an unfamiliar world in his declining years. Mr. Conte and Ms. Nivens are co-authoring a two-part account of Mr. Ford's personal and legal travails. They are currently in the process of getting the first part published, and the second part will rely crucially on the audio recordings from Mr. Ford's post-conviction proceedings. Transcripts—which convey none of the emotion that occurs at such hearings, which are known to contain inaccuracies, and which can be extremely expensive¹—are simply no substitute for Rule 16-504(h)'s right to obtain copies of audio recordings.

C. Petitioner Conte's Requests Under Rules 16-504(h) and (i)

16. On March 28, 2019, Mr. Conte emailed Respondent Deborah Elms Zrioka, the Court Administrator for the Circuit Court for Charles County, to “inquire about the procedure for accessing courtroom recordings” pursuant to Rule

¹ For example, Respondent Zrioka's administrative assistant estimated that it would cost \$1,425 to produce transcripts of only some of the audio recordings that Mr. Conte wishes to obtain.

16-504(h)(1).² Mr. Conte stated that he wished to obtain audio recordings from a case that was “closed in 2016.”

17. The next day, Ms. Zrioka emailed Mr. Conte to inform him that “the court cannot provide you with an audio disk of the 2016 hearing that you seek.” As justification, Ms. Zrioka cited an attached document entitled “Administrative Order No. 05-3,” which was issued on June 27, 2005, by then-Administrative Judge Robert C. Nalley.³ *See* Exhibit A. Ms. Zrioka characterized this order as “the prevailing authority for audio recording requests” in this Circuit. Paragraph 3 of that order reads as follows: “[D]uplicate recorded discs will NOT be furnished to other than a commercial reporting service engaged by the chief reporter to transcribe discs’ contents.” According to Ms. Zrioka, Judge Nalley’s order satisfies Rule 16-504(h)(1)(C), which permits restrictions on access “as ordered by the court.”

18. In response, Mr. Conte asked whether there was “any rationale or reason for Administrative Order 05-03,” either “at the time it was issued/or currently.”

² Respondent Zrioka is the authorized custodian of electronic recordings maintained by the Court. Although this responsibility was once vested in a chief court reporter employed by the Court, no such position currently exists.

³ Judge Nalley was removed from the bench in 2014 after pleading guilty to federal civil-rights charges for ordering that an electric shock be administered to a pro se defendant in his courtroom. *See* Press Release, Dep’t of Justice, U.S. Attorney’s Office, District of Maryland, Former Charles County Circuit Court Judge Sentenced for Civil Rights Violation (March 31, 2016), *available at* <https://perma.cc/8XGF-47WZ>. This abuse of authority remained unknown until a recording of the incident emerged.

19. Ms. Zrioka replied as follows: “The Administrative Order was promulgated well in advance of my tenure in the Court Administrator’s position. The judge who authored the order retired many years ago. Therefore, I do not possess any historical knowledge pertaining to the rationale behind the order to answer your question.” Ms. Zrioka’s email also failed to identify any present justification for the order.

20. On July 14, Ms. Zrioka’s administrative assistant, Sondra Graves, confirmed in an email to Mr. Conte that “the Circuit Court for Charles County does not provide discs” containing audio recordings.

21. Mr. Conte separately sought to exercise his rights under Rule 16-504(i)(1). On March 28, 2019, Mr. Conte emailed Ms. Graves to request to listen to audio recordings from Mr. Ford’s post-conviction proceedings (case numbers 08-K-52-000259 and 08-K-75-004825). Ms. Graves responded later that day, indicating that his request would “not [be] a problem.”

22. The next day, however, Ms. Graves followed up with a question: “[A]re you a practicing attorney?” Mr. Conte indicated that he was not. Ms. Graves responded as follows: “Listening to the Court’s audio system is a courtesy extended to practicing attorneys only. The general public is not permitted to listen to the audio system; therefore, you will not be able to listen to your [requested] hearings.”

23. Later on March 29, a local attorney emailed Ms. Graves to make an appointment for himself and Mr. Conte: “I will be with Mr. Conte as he researches

my case of State v Charles Ford.” Ms. Graves rejected this request to allow Mr. Conte to listen to audio recordings in the presence of a practicing attorney: “Due to security reasons, Mr. Conte is not permitted to listen to CourtSmart.”⁴ Ms. Graves did not explain what “security” reasons allegedly justified depriving a journalist of his state-law right to listen to audio recordings under the Court’s supervision.

24. On August 5, 2019, Mr. Conte emailed Ms. Zrioka (copying Ms. Graves) to ask her to clarify the legal basis for this denial: “[C]ould you please provide the court order that explains why I am not entitled to listen/view audio-visual recordings, as stated under RULE 16-504 (i)?”

25. On August 7, Ms. Zrioka responded as follows: “Per your request, I have attached Administrative Order 05-03. This is the same Order provided to you as an attachment to my March 29, 2019 reply to your original inquiry.”

26. Mr. Conte replied later that day: “Could you be specific on how Order 05-03 is relevant - because this explains the process for accessing reproduction copies and transcripts.” His email continued: “RULE 16-504 (i) is about listening. I was told that only lawyers are allowed to listen to the recordings. According to what order?” Ms. Zrioka did not respond to that email, or to a follow-up email from Mr. Conte on August 12.

27. With no clarification from Ms. Zrioka, Mr. Conte renewed his request

⁴ CourtSmart is the digital recording system that the Court uses to produce audio recordings of its proceedings.

with Ms. Graves on August 15: “I would like to resubmit my request to listen to all of these recordings, under Rule 504 (i). How might I proceed?” Ms. Graves never responded to this subsequent inquiry.

D. Petitioner Nivens’s Requests Under Rules 16-504(h) and (i)

28. On September 4, 2019, Petitioner Angela Nivens emailed Respondent Zrioka to request copies of audio recordings for all of Mr. Ford’s post-conviction proceedings (case numbers 08-K-52-000259 and 08-K-75-0004825). Ms. Nivens stated that she was “requesting copies of the recordings under Maryland Rule 16-504(h).” Finally, she indicated that “[i]f you refuse to provide copies of the audio recordings, then I request an opportunity to listen to the recordings at the courthouse under Maryland Rule 16-504(i).”

29. Later that day, Ms. Zrioka responded as follows: “The court did not introduce audio recording of court proceedings until the early 2000’s. The technology did not exist in 1952 or 1975: the years indicated in the case numbers you cite. . . . Given these facts, the court is not able to honor your request, because no such audio record exists.”

30. On September 5, Ms. Nivens sent a follow-up inquiry to Ms. Zrioka: “Can you provide the audio for the appeal hearings that occurred [in] 2013-2016?” A few minutes later, Ms. Nivens supplemented that question with the following information:

For clarity, [t]he audio recordings I am requesting are from post-conviction proceedings in each of those cases, not from the underlying criminal proceedings. As the online Case Search tool indicates, several hearings occurred in cases 08-K-52-000259 and 08-K-75-004825 after the Court began recording its proceedings (for example, on October 17, 2014; February 18, 2015; and December 18, 2015). I am requesting copies of audio recordings for all hearings held in those two cases, pursuant to Maryland Rule 16-504(h). As mentioned in my original email, if you refuse to provide copies of those recordings, then I would request to listen to the recordings at the courthouse under Maryland Rule 16-504(i).

Ms. Zrioka never responded to either of these additional emails.

CLAIMS

31. All of the preceding paragraphs are incorporated herein, as if re-alleged in this section.

COUNT I: MANDAMUS – RIGHT TO OBTAIN COPIES OF AUDIO RECORDINGS

32. “A court of competent jurisdiction may issue a writ of mandamus in order to compel the performance of a non-discretionary duty.” *Wilson v. Simms*, 380 Md. 206, 217 (2004). In general, “a common law mandamus action is appropriate where ‘the relief sought involves the traditional enforcement of a ministerial act (a legal duty) by recalcitrant public officials.’” *Town of La Plata v. Faison-Rosewick LLC*, 434 Md. 496, 511 (2013) (citation omitted).

33. As noted above, the plain language of Rule 16-504(h) imposes a non-discretionary duty on the Charles County Court Administrator—as custodian of the Court’s electronic recordings—to provide any person with a copy of an audio recording upon written request. *See* Md. Rule 16-504(h)(1) (“[T]he authorized

custodian of an audio recording *shall* make a copy of the audio recording or, if practicable, the audio portion of an audio-video recording, available to any person upon written request.” (emphasis added)). The Rule’s use of the word “shall” demonstrates the Court of Appeals’ intent for this duty to be mandatory, rather than discretionary. *See Dove v. State*, 415 Md. 727, 738 (2010) (“As this Court . . . ha[s] reiterated on numerous occasions, the word ‘shall’ indicates the intent that a provision is mandatory.”).

34. Citing Rule 16-504(h)(1)(C), Respondent has invoked Administrative Order No. 05-3 as a basis for denying Petitioner’s request. Subsection (h)(1)(c) creates a narrow exception to a circuit-court custodian’s general duty to “make a copy of [an] audio recording . . . available to any person upon written request.” For three distinct reasons, however, Administrative Order No. 05-3 cannot trigger that exception.

35. First, the exception plainly cannot be invoked on a *circuit-wide* basis, thereby allowing an exception to the Rule to swallow that Rule entirely. Rule 16-504(h) would serve little purpose if every judicial circuit could simply opt out of the Rule’s core requirement in a blanket fashion. The entire objective of the Maryland Rules is to establish consistent practices across the State. Allowing a local court—let alone an individual local judge—to override a requirement set forth in the Rules would contravene that objective. The text of Rule 16-504(h), which focuses on specific audio recordings of individual proceedings, confirms that the “ordered by the

court” exception cannot be invoked in such an indiscriminate fashion.

36. Second, Administrative Order No. 05-3 is *ultra vires*. Under Maryland law, administrative judges may perform only those “administrative duties necessary to the effective administration of the internal management of the court and the prompt disposition of litigation in it.” Md. Rule 16-105(b)(12). Eliminating the public’s right to obtain audio recordings serves no purpose related to the internal management of the Court. Rather, it reaches *externally* by altering the substantive rights of members of the public for reasons unrelated to their use of the court system. Nor is the order in any sense “necessary” to the effective management of the Court’s internal operations. When asked to identify any “rationale or reason” for the order, Ms. Zrioka was unable to provide one. And the order—by definition—reaches far more broadly than necessary, given that Rule 16-504’s drafters deliberately created other, more-particularized mechanisms for preventing any harms that might result from the release of audio recordings.

37. Third, as a matter of statutory interpretation, the only actor authorized to invoke the “ordered by the court” exception is the judge presiding over the relevant case—not the administrative judge for the entire court system. The vast majority of Maryland Rules that contemplate action by “the court” clearly do not authorize the administrative judge to issue generally applicable administrative orders. And the surrounding text confirms that subsection (h)(1)(C)’s use of “the court” refers to a presiding judge, rather than an administrative judge acting in his or her

administrative capacity. *See, e.g.*, Rule 16-504(d) (“Unless ordered by the court with the approval of the administrative judge . . .”).

38. In sum, far from excusing Respondent’s violations of Rule 16-504(h)(1), Administrative Order No. 05-3 deprives Petitioners of rights that the Rule explicitly guarantees. Because there is no adequate remedy at law to cure these violations, mandamus is warranted here.

COUNT II: MANDAMUS – RIGHT TO LISTEN TO AUDIO RECORDINGS

39. The plain language of Rule 16-504(i) imposes a non-discretionary duty on the Charles County Court Administrator—as custodian of the Court’s electronic recordings—to permit any person to listen to an audio recording upon written request.⁵ *See* Md. Rule 16-504(i)(1) (“[T]he authorized custodian of an audio-video recording, upon written request from any person, *shall* permit the person to listen to and view the recording at a time and place designated by the court, under the supervision of the custodian or other designated court official or employee.” (emphasis added)).

40. Respondent has invoked Administrative Order No. 05-3 as a basis for denying Petitioners’ requests. As noted, subsection (i)(1) creates a narrow exception to a circuit-court custodian’s general duty to permit “any person” to listen to a

⁵ Because the Charles County Circuit Court’s CourtSmart recording system generates audio-only recordings, for purposes of this Count, Petitioners assert only a right to listen to the Court’s audio recordings.

recording upon written request. But Administrative Order No. 05-3 cannot trigger subsection (i)(1)'s "ordered by the Court" exception, given that the order does not even purport to restrict anyone's right to listen to recordings. With no valid basis for denying Petitioners' requests under subsection (i), Respondent Zrioka has a non-discretionary duty to permit Petitioners to listen to their requested recordings.

41. Even if Administrative Order No. 05-3 could somehow be construed as invoking subsection (i)(1)'s "ordered by the Court" exception, that restriction would be invalid for each of the three reasons set forth in Count I. An administrative judge cannot unilaterally eliminate the right to listen to audio recordings of court proceedings throughout an entire judicial circuit. After all, the Court of Appeals enacted Rule 16-504(i)'s "Right to Listen" following the Rules Committee's "unanimous" recommendation. Standing Comm. on Rules of Practice & Procedure, *178th Report: Part I – Notice of Proposed Rules Changes*, at 7 (2013).⁶

42. Because there is no adequate remedy at law to cure Respondent's violations of Rule 16-504(i)(1), mandamus is warranted here.

COUNT III: DECLARATORY RELIEF

43. For all of the reasons set forth in Counts I and II, Petitioner is entitled to a declaratory judgment clarifying that Respondent Zrioka presently has a non-discretionary duty to permit any person, upon written request, to (1) obtain copies of

⁶ A copy of the report is available at <https://perma.cc/A6TX-V6H7>.

audio recordings of Charles County Circuit Court proceedings (upon payment of reasonable costs) and (2) listen to those recordings at the courthouse.

RELIEF

WHEREFORE, Petitioners respectfully ask this Court to grant the following relief:

(a) Issuance of a writ of mandamus directing Respondent Deborah Elms Zrioka to provide Petitioners with copies of all audio recordings maintained by the Circuit Court for Charles County in cases 08-K-52-000259 and 08-K-75-004825 (upon payment of reasonable costs), pursuant to Maryland Rule 16-504(h)(1);

(b) Issuance of a writ of mandamus directing Respondent Zrioka to permit Petitioners to listen to those recordings at the courthouse, pursuant to Maryland Rule 16-504(i)(1);

(c) A declaratory judgment that Administrative Order No. 05-3, paragraph 3 is invalid, and that Respondent Zrioka presently has a non-discretionary duty to (1) provide copies of audio recordings of Charles County Circuit Court proceedings to any person upon written request, and upon payment of reasonable costs; and (2) permit any person to listen to those recordings upon written request;

(d) Any other relief that this Court deems just and proper.

September 13, 2019

Respectfully submitted,

/s/ Daniel B. Rice

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CERTIFICATION

I certify that I am a member in good standing of the Maryland bar.

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