IN THE CIRCUIT COURT FOR CHARLES COUNTY, MARYLAND

ANDREA CONTE,	:	
&	:	
ANGELA NIVENS,	:	
Petitioners,	:	Case No. C-08-CV-19-000804
vs.	:	
DEBORAH ELMS ZRIOKA, Court Administrator for the Circuit Court for Charles County,	:	
Respondent.	:	

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Since 2005, 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 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."

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.

This case arises from the Charles County court administrator's failure to follow those Rules. The court administrator has entirely refused to make copies of audio recordings available to the public, relying on a local administrative order that predates the Rules' access provisions. But a *local* administrative order cannot override a *State* Rule—especially when the Rule confers substantive rights upon the general public. Moreover, the administrative order that the court administrator has 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.

To make matters worse, court officials regard the ability to listen to recordings at the courthouse 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.

Petitioners are a close friend and family member of the late Charles Edret Ford, who was released from prison in 2016 after serving the longest sentence in Maryland history. 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.

Respondent Deborah Elms Zrioka is the court administrator for the Circuit Court for Charles County. Ms. Zrioka's refusal to comply with Rules 16-504(h) and 16-504(i) has effectively annulled those statewide guarantees within Charles County. Mandamus relief is therefore necessary to make the Rules' requirements a reality—and to restore the transparency that the Rules are meant to foster.

FACTUAL AND LEGAL BACKGROUND

A. Maryland Rule 16-504

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.

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.

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.

Rule 16-504(h)(1). The right to obtain copies of circuit-court recordings has existed since July 1, 2005.[1] The right was re-codified in 2016 as Rule 16-504(h), which has remained unchanged since then.[2]

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

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1 *See* Maryland Court of Appeals, Rules Order, Apr. 5, 2005, at 108 (eff. July 1, 2005) (hereinafter "2005 Rules Order"), https://perma.cc/DKW8-4C93.

2 *See* Maryland Court of Appeals, Rules Order, June 6, 2016, at 101 (eff. July 1, 2016), https://perma.cc/EA5Q-4LXD.

designated court official or employee.

Rule 16-504(i)(1).

B. The Court Recordings at Issue

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 after an all-white Charles County jury convicted him of murder in 1952. Affidavit of Angela Nivens ¶ 1. He was finally released in 2016, at age 84, following rulings from this Court that his trial counsel was constitutionally deficient and that a second, later conviction violated due process. *Id.* According to existing records, 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. Affidavit of Andrea Conte ¶ 3.

Petitioner Nivens is Mr. Ford's great-niece. Nivens Aff. ¶ 1. Due to Mr. Ford's prolonged confinement, Ms. Nivens did not even know that he existed until late 2014. *Id.* ¶ 2. She connected with Mr. Ford and grew closer to him as the months went by, until his passing in August 2018. *Id.* ¶¶ 2-3. Just before his release in 2016, Mr. Ford told the presiding judge, "I met my great-niece. She's a beautiful person. That's my family now." *Id.* ¶ 2.

Ms. Nivens wishes to obtain audio recordings of her great-uncle's proceedings in order to help preserve his memory. *See* Nivens Aff. ¶ 3 ("Because our time with

[Mr. Ford] was so short—and because he was incarcerated for so long—my family and I have precious few mementos to keep his memory alive."). According to Ms. Nivens, "We want to hear Charlie's voice again. Rather than simply reading a transcript of what he said, we want to *listen* to him tell his truth in open court after decades of being silenced." *Id.* Hearing Mr. Ford speak 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. *Id.*

Petitioner Conte is a writer, researcher, and nonfiction filmmaker who has been researching Mr. Ford's case since 2016. Conte Aff. ¶¶ 1, 3. 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. *Id.* ¶ 3. 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, which was limited in its scope because of Petitioners' inability to access recordings of Mr. Ford's post-conviction proceedings. *Id.* ¶ 4. Part two will rely crucially on those audio recordings. *See* Conte Aff. ¶ 4; Nivens Aff. ¶ 4. Transcripts—which convey none of the human emotion, physical feeling, and personal tone that occurs at court hearings; which are known to contain inaccuracies; and which can also be extremely

expensive[3]—are simply no substitute for Rule 16-504(h)'s right to obtain copies of audio recordings. Conte Aff. ¶ 4.

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

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 16-504(h).[4] Conte Aff., Ex. A. Mr. Conte stated that he wished to obtain audio recordings from a case that was "closed in 2016." *Id.*

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." Conte Aff., Ex. A. 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.[5] *See* Conte Aff., Ex. B. Ms. Zrioka

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[3] For example, Ms. 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. Conte Aff., Ex. C.

[4] 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.

[5] 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.

characterized this order as "the prevailing authority for audio recording requests" in Charles County. *Id.*, Ex. A. 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." *Id.*, Ex. B. 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." *See* Conte Aff., Ex. A.

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." Conte Aff., Ex. A. 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." *Id.* Ms. Zrioka's email also failed to identify any present justification for the order. On July 14, Ms. Zrioka's administrative assistant, Sondra Graves, confirmed in an unrelated email to Mr. Conte that "the Circuit Court for Charles County does not provide discs" containing audio recordings. Conte Aff., Ex. C.

Mr. Conte also sought to exercise his right to listen to the recordings under Rule 16-504(i). On March 28, 2019, Mr. Conte separately emailed Ms. Graves to request to listen to audio recordings from Mr. Ford's post-conviction proceedings. *See* Conte Aff., Ex. D. Ms. Graves responded later that day, indicating that his request would "not [be] a problem." *Id.*

The next day, however, Ms. Graves followed up with a question: "[A]re you a practicing attorney?" Conte Aff., Ex. D. Mr. Conte indicated that he was not. *See id.* 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." *Id.*

Later that day, 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." Conte Aff., Ex. E. 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."[6] *Id.* Ms. Graves did not explain or expound on what she meant by "security reasons."

On August 5, Mr. Conte emailed Ms. Zrioka to ask her to clarify the legal basis for denying his request to listen to the recordings under Rule 16-504(i). Conte Aff., Ex. F. 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." *Id.*

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

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

transcripts." Conte Aff., Ex. F. 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?" *Id.* Ms. Zrioka did not respond to that email, or to a follow-up email from Mr. Conte on August 12. *See id.*

With no clarification from Ms. Zrioka, Mr. Conte renewed his request with Ms. Graves on August 15: "I would like to resubmit my request to listen to all of these recordings, under Rule 16-504 (i). How might I proceed?" Conte Aff., Ex. C. Ms. Graves never responded to this subsequent inquiry.

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

On September 4, 2019, Ms. Nivens emailed Ms. Zrioka to request copies of audio recordings for all of Mr. Ford's post-conviction proceedings. Ms. Nivens provided the relevant case numbers and stated that she was "requesting copies of the recordings under Maryland Rule 16-504(h)." Nivens Aff., Ex. A. 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)." *Id.*

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." Nivens Aff., Ex. A.

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?" Nivens Aff., Ex. B. Shortly thereafter, 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).

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

ARGUMENT

"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). As explained below, this case satisfies that standard.

I. THE COURT ADMINISTRATOR'S REFUSAL TO FULFILL PETITIONERS' REQUESTS VIOLATES MARYLAND RULE 16-504.

The plain language of Rule 16-504(h) imposes a non-discretionary duty on the custodian of the Court's electronic recordings—in this case, the Respondent court

administrator—to provide members of the public with copies of those recordings upon request. As noted above, the Rule states that "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." Rule 16-504(h)(1) (emphasis added). The Rule's use of the word "shall" demonstrates the Court of Appeals' intent to create a mandatory duty, rather than to leave fulfillment of these requests to each recipient's discretion. *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.").

The same is true of Rule 16-504(i), which provides that "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" (emphasis added). This provision, too, enacts a clear legal imperative with which custodians of court recordings must comply.

For these reasons, Rules 16-504(h) and (i) impose non-discretionary duties on the Charles County court administrator. Respondent violated those duties by refusing to fulfill Petitioners' written requests to obtain copies of audio recordings and to listen to those recordings under the Court's supervision.

II. A LOCAL ADMINISTRATIVE ORDER CANNOT ELIMINATE THE OBLIGATIONS IMPOSED BY RULE 16-504.

The sole authority Respondent has cited for refusing to provide members of

the public with audio recordings requested under Rule 16-504 is Administrative Order No. 05-3. But that order was issued on June 27, 2005—four days before the effective date of a new Rule (now codified as Rule 16-504(h)) explicitly directing all circuit courts to provide copies of audio recordings to any person upon request.[7] Rule 16-504(h)'s mandatory language squarely forecloses the blanket restriction imposed by the outmoded administrative order. Because the order enacts an arbitrary restriction with no basis in Maryland law, Respondent's continued reliance on that order as "the prevailing authority for audio recording requests" is unlawful. Conte Aff., Ex. A. Summary judgment should therefore be granted in favor of Petitioners under Rules 16-504(h) and (i).

A. Local officials cannot nullify statewide guarantees.

Rule 16-504(h)(1) expressly confers upon "any person" a "[r]ight" to obtain copies of audio recordings of circuit-court proceedings. And Rule 16-504(i) similarly grants "any person" a "[r]ight" to listen to those recordings under the court's supervision. Under Respondent's view, local administrative judges may entirely eliminate these rights within their jurisdictions—for all people in all circumstances—simply by issuing a single administrative order. That view is untenable.

Rules adopted by the Court of Appeals must be given "a reasonable interpretation in tune with logic and common sense." *Holmes v. State*, 350 Md. 412,

[7] *See* 2005 Rules Order, *supra* note 1 (https://perma.cc/DKW8-4C93).

422 (1998) (citation omitted). As explained above, the entire purpose of Rules 16-504(h) and (i) is to enable members of the public to access audio recordings of circuit-court proceedings. Those same provisions cannot plausibly be interpreted to permit the elimination of the public's right to audio recordings in each administrative judge's complete discretion. Respondent's hyperliteral reading of "ordered by the court" thus produces "an absurdity, and a result totally at odds with the objective of" the Rule's core guarantees. *Kaczorowski v. Mayor & City of Baltimore*, 309 Md. 505, 518 (1987); *see also Miller v. W. Elec. Co.*, 310 Md. 173, 187 (1987) ("If a statute contained plain language that, read literally, produced an absurd result inconsistent with the purpose of the statute we would not be compelled to read that language literally.").

Moreover, Respondent's reading of Rule 16-504 would render yet another key provision of that Rule a dead letter. Subsection (h)(3) provides that the custodian of audio recordings "shall" make unredacted copies of recordings available to, among others, the "part[ies] to the proceeding or the attorney for a party." Rule 16-504(h)(3)(G). But that guarantee contains a familiar exception: "unless otherwise ordered by the court." *Id.* Administrative Order No. 05-3 purports to eliminate not just the public's right to obtain copies of audio recordings, but also the expressly guaranteed right of parties and their attorneys to receive unredacted versions of those same recordings. It "defies logic" to conclude that the Court of Appeals simultaneously granted this right and gave government officials carte blanche to ignore it. *Kranz v. State*, 459 Md. 456, 475 (2018).

Respondent's effort to seize on Rule 16-504's "ordered by the court" exceptions drains the Rule's primary guarantees of any meaning. Such "an absurd result . . . could not possibly have been intended" by the Court of Appeals. *In re Jason W.*, 378 Md. 596, 604 (2003). In fact, Administrative Order No. 05-3 inverts Rule 16-504(h)'s presumption: instead of providing "any person" access to audio recordings (save in exceptional circumstances), Respondent permits *no one* to access audio recordings unless some limited exception—one of the Court's own creation—applies.

Local courts cannot revise the Maryland Rules in this way, because the Rules' central objective is to establish uniform practices for *all* Maryland courts. *See* 7 Md. Law Encyclopedia, Courts § 31 ("The Maryland Rules are not mere guides to the practice of law, but precise rubrics established to promote the orderly and efficient administration of justice, and are to be read and followed."). Allowing a local court—let alone a single local judge—to override a requirement set forth in the statewide Rules would contravene that objective. *See, e.g.*, *Owen v. Freeman*, 279 Md. 241, 248 (1977) ("[T]he courts in Baltimore City cannot 'relinquish' or 'waive' the mandate expressed in Maryland Rule 625a since it has long been recognized that the courts of this State cannot dispense with validly established rules."); *Dove*, 415 Md. at 739 ("[C]ompliance with these rules is never discretionary, as the Maryland Rules of Procedure have the force of law" (citation omitted)).

In fact, the Rules Committee has specifically highlighted the importance of

establishing a "uniform approach to access to audio and audio-video recordings of court proceedings." Standing Comm. on Rules of Practice & Procedure, *154th Report – Notice of Proposed Rules Changes*, at 121 (2005).[8] In place of Rule 16-504's statewide uniformity, Respondent's understanding would permit local courts to construct a patchwork of circuit-specific policies—a result radically inconsistent with "the overall legislative scheme." *Kranz*, 459 Md. at 475.

Rule 16-504's text and enactment history confirm that the "ordered by the court" exceptions cannot be used to subvert the Rule's core guarantees. Nothing in the text of Rule 16-504 says that audio recordings may be withheld in a blanket fashion. Instead, the text indicates that judges presiding over individual cases may, in the course of those assignments, deny access to recordings of *specific proceedings*. For example, the Rule permits a court to withhold "a copy of *the* audio recording" that would otherwise be available to the person who requested *that recording*. Rule 16-504(h)(1) (emphasis added). The very next sentence likewise refers to a single, identifiable recording that a member of the public has already requested. *See* Rule 16-504(h)(2) (directing "the custodian of *the recording*" to redact "all portions of *the recording* that the court has directed be safeguarded" (emphases added)). And Rule 16-504(h)(3)(G) tellingly uses the key phrase "ordered by the court" in reference to "the proceeding" that is the subject of a particular request. In short, Rule 16-504's

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[8] A copy of the report is available at https://perma.cc/5WJS-TWLC.

access provisions uniformly focus on individual recordings from specific proceedings.[9] Respondent's insistence that courts may deny access to all recordings in one fell swoop contravenes the Rule's clear text.

Respondent's reading of Rule 16-504 is misconceived for yet another reason: the Rule already contains multiple mechanisms for preventing any harms that could result from the disclosure of court recordings. For instance, if a presiding judge determines that certain proceedings "should and lawfully may be shielded from public access," then those portions of audio recordings must be redacted. Rule 16-504(g). And if some identifiable harm would nonetheless result from divulging a recording's contents, that recording may lawfully be withheld under Rules 16-504(h)(1)(C) and (i)(1). It is inconceivable that the Rule's drafters would have fine-tuned the scope of public access to court recordings in this way, but nonetheless permitted local officials to extinguish that right of access on a whim.

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[9] For other instances of this particularized focus, see Rule 16-504(g)("a proceeding," "the recording"); Rule 16-504(h)(1) ("an audio recording," "an audio-video recording," "the copy"); Rule 16-504(h)(2) ("a recording," "the copy"); Rule 16-504(h)(3) ("a copy of the audio recording or . . . an audio-video recording"); Rule 16-504(h)(3)(D)("the presiding judge in the case"); Rule 16-504(h)(3)(H) ("the proceeding," "a proceeding"); Rule 16-504(i)(1) ("an audio-video recording," "the recording"); Rule 16-504(i)(2) ("the recording"); Rule 16-504(i)(3) ("the recording"); Rule 16-504(j)(1) ("a copy of the audio-video recording," "a recording of proceedings"); Rule 16-504(j)(1)(D) ("the presiding judge in the case"); Rule 16-504(j)(1)(G) ("the proceeding"); Rule 16-504(j)(1)(H) ("the proceeding," "the recording"); Rule 16-504(j)(2) ("a copy of an electronic recording"); Rule 16-504(j)(2)(A) ("the recording"); Rule 16-504(j)(2)(B) ("the recording").

Rule 16-504's enactment history powerfully reinforces this holistic reading of the Rule. The Rules Committee's report on its proposed 2013 amendments states that the "Committee was *unanimous* in the view that . . . members of the public should have a right of access to a properly redacted copy of [court recordings], at least for the purpose of listening or viewing." Standing Comm. on Rules of Practice & Procedure, *178th Report: Part I – Notice of Proposed Rules Changes*, at 7 (2013) ("*2013 Report*") (emphasis added).[10] The Court of Appeals endorsed that recommendation by enacting Rule 16-504(i)'s "Right to Listen." Respondent has no authority to disregard a right that the Rules Committee "unanimous[ly]" sought to protect—and that the Court of Appeals, in turn, explicitly guaranteed.

Nor can Respondent flout the Court of Appeals' crystal-clear intent to establish a right to obtain copies of audio recordings. In 2013, the Rules Committee considered amending the Rules to restrict the public's ability to obtain copies of those recordings. The Committee even presented the Court of Appeals with two alternative versions of the proposed Rule: one designed to preserve the public's right to obtain copies of recordings, and one that would have eliminated that right. *2013 Report*, at 110, 124-30. The Court of Appeals' decision to adopt the current version of the Rule thus reflects a deliberate choice to protect the public's "Right to Obtain Cop[ies] of Audio Recording[s]." Rule 16-504(h).

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[10] A copy of the report is available at https://perma.cc/A6TX-V6H7.

B. Administrative Order No. 05-3 is ultra vires.

The administrative order is unlawful for yet another reason: it exceeds administrative judges' statutory authority. Administrative judges have no power to divest members of the public of rights explicitly guaranteed to them by state law.

Judge Nalley issued Administrative Order No. 05-3 in his capacity as Administrative Judge for the Charles County Circuit Court. Yet administrative judges are not endowed with plenary authority over their respective courts. They may exercise only "the administrative powers conferred upon them" by law. Rule 16-101(c); *see also St. Joseph Med. Ctr. v. Turnbull*, 432 Md. 259, 277 (2013) ("Whether a judge acts in a judicial or administrative capacity, his or her actions must be within the scope of his or her authority."). Elsewhere, the Maryland Rules authorize administrative judges to 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." Rule 16-105(b)(12).

Administrative Order No. 05-3 has nothing to do with the disposition of litigation in the Charles County Circuit Court. Nor does the order fall within Rule 16-105(b)(12)'s other source of authority, since the order serves no purpose related to the "internal management" of the Court and is in no sense "necessary" to the effective management of the Court's internal operations.

First, the order's objectives—whatever they might be—are unrelated to the "internal management" of the Court and its personnel. Paragraph 3 of the order

simply dictates who may and may not receive copies of court recordings. Administrative Order No. 05-3 thus reaches *externally* by altering the substantive rights of members of the public for reasons unrelated to their use of the court system. Because Respondent continues to treat the order as authoritative, persons who did not participate in a case—and who may never set foot in a courtroom—are stripped of their state-law entitlement to obtain audio recordings of court proceedings.

To be sure, administrative judges are charged with "supervision of the judges, officials, and employees of the court," Rule 16-105(b)(1)—including the court administrator. But administrative judges may not issue whatever directives they please under the guise of "supervising" court staff. Otherwise, administrative judges could unilaterally nullify legal guarantees simply by ordering court personnel not to honor them. That is exactly what has occurred through Administrative Order No. 05-3. If Respondent's reading of Rule 16-504 were correct, then Judge Nalley's successor could direct the Clerk's office to stop issuing marriage licenses and accepting new legal complaints for filing. The court administrator could be ordered to discontinue the recording of court proceedings, contrary to Rule 16-503. And individual circuit-court judges could be instructed to grant or deny particular motions to dismiss. In short, "supervision" cannot be an end in itself; it must always be in service of some objective that an administrative judge may lawfully pursue.

Second, Administrative Order No. 05-3 was in no sense "necessary" to the effective administration of the Court's internal management. Paragraph 3 of the order

is entirely unreasoned; it simply dictates that only commercial reporting services may receive copies of audio recordings. *See* Conte Aff., Ex. B. Even Respondent herself—the court administrator—possesses no "knowledge pertaining to the rationale behind the order." *Id.*, Ex. A. When asked, moreover, she declined to identify any continuing justification for the 14-year-old restriction on access, *id.*—one that predates a Rule *requiring* such access. Administrative Order No. 05-3 thus cannot be "necessary" to any identifiable purpose, given that court officials do not know what purpose it serves.

Rule 16-504's interlocking provisions confirm that the order's sweeping prohibition cannot be "necessary" to its underlying aims (whatever they might be). The Rule already contains other, more-targeted mechanisms for preventing any harms that might result from the release of audio recordings. If portions of a recording contain information that "should and lawfully may be shielded from public access and inspection," then the presiding judge may direct that those portions be redacted. *See* Rule 16-504(g). And if that particularized process would be insufficient to safeguard such especially sensitive information, then the entire recording may be withheld under subsection (h)(1)(c). By definition, then, Administrative Order No. 05-3's blanket prohibition—which applies to the *entirety* of *every* recording in *every* case—sweeps far more broadly than necessary.

If individualized denials were issued in such a groundless manner, those abuses of authority—as "arbitrary, capricious or unreasonable" acts—would be redressable

through mandamus relief. *Goodwich v. Nolan*, 343 Md. 130, 146 (1996). Here, Respondent relies on an administrative order that functions simply as the aggregation of thousands of unlawful denials. But it cannot be "necessary" to the Court's internal management to prejudge all requests in such an arbitrary fashion.

Of course, administrative judges' actions need not be literally *indispensable* to the accomplishment of a permissible objective. To be "necessary," however, those acts must bear at least a reasonable relationship to such an end. *See* Md. Op. Att'y Gen. 103, 107 (1993) (concluding that administrative judges may institute measures "reasonably related to courthouse security"). Judge Nalley's order comes nowhere close to meeting that standard. Its across-the-board restriction shields recordings whose release would threaten no conceivable harm. Consider the requests at issue in this very case: petitioners seek audio recordings of post-conviction proceedings relating to a criminal trial that occurred in 1952. Not a single person who participated in that trial is alive today. Conte Aff. ¶ 2. The subject of the post-conviction proceedings, Charles Edret Ford, passed away in 2018. Nivens Aff. ¶ 3. And because a judge of this Court found constitutional deficiencies in both of Mr. Ford's decades-old criminal cases, *id.* ¶ 1, the recordings have tremendous educational value.

Administrative Order No. 05-3 does not manage the Court's internal affairs, and it bears no rational relationship to any demonstrated problem. Because that order transgresses the limitations on administrative judges' authority, Respondent cannot lawfully invoke it to override Petitioners' legal rights.

C. Only the presiding judge in a case may invoke Rule 16-504's "ordered by the court" exceptions.

The only actor authorized to invoke Rule 16-504's "ordered by the court" exceptions is the judge presiding over the relevant case—not the administrative judge for the entire court system. Indeed, if the phrase "the court" encompassed the administrative judge of any court—as Respondent would have it—then numerous provisions of the Maryland Rules would cease to make any sense.

For example, consider Rule 2-517(a), which provides that "[t]he court shall rule . . . promptly" upon any evidentiary objections raised during a civil proceeding. Under Respondent's reading of "the court," administrative judges could issue a standing order denying or sustaining all evidentiary objections in all cases. Or consider Rule 5-614, which provides that "the court, where justice so requires, may call persons as court witnesses on its own initiative" and "may interrogate any witness." If Respondent's reading of "the court" were correct, this Rule would empower administrative judges to call and interrogate witnesses during any trial—even when another judge is presiding. Or consider Rule 4-349(d), which provides that "[t]he court . . . may revoke an order of release or amend it to impose additional or different conditions of release" upon any person convicted of a crime. Respondent's reading of "the court" would mean that post-conviction conditions of release could be revoked or amended via generally applicable administrative orders.

Administrative judges are members of their respective courts, of course. But

administrative judges wear two different hats: they act in both a judicial capacity (performing case-specific functions) and in an administrative capacity (performing circuit-wide functions). It cannot be true that every Maryland Rule that contemplates action by "the court" authorizes each administrative judge to act *administratively*, and certainly not on a court-wide basis. Such a position would erase the limitations on administrative judges' authority that the Rules carefully prescribe. *See* Rule 16-105(b). And numerous Rules (as well as statutes) use "the court" in ways that plainly refer exclusively to the presiding judge in a specific case.[11] In fact, the sheer number of Rules that delegate case-specific responsibilities to "the court" suggests that in *most* circumstances the phrase must be construed to refer to the presiding judge—not to the administrative judge acting in a circuit-wide capacity.[12]

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[11] For instance, Respondent's reading of "the court" would enable administrative judges to issue administrative orders adding or removing parties to civil actions, Rule 3-213; permitting pleadings to be amended, Rule 3-342; striking pleadings and granting motions to dismiss, Rule 2-322(c)-(e); mandating depositions, Rule 4-261; subpoenaing the production of evidence, Rule 2-514; sanctioning parties who abuse subpoenas, Rule 3-510(a)(3); extending the expiration dates for temporary restraining orders, Rule 15-504(c); entering judgments of conviction, Md. Code, Crim. Proc. § 6-221; and assessing penalties to remedy discriminatory housing practices, Md. Code, State Gov't § 20-1032(b)(2)(i).

[12] For other instances in which "the court" self-evidently refers to the presiding judge in a specific case, see, e.g., Rule 2-401(b), (g); Rule 2-402; Rule 2-403(a); Rule 2-421(a); Rule 2-510(a)(3), (e)-(f); Rule 3-421(a)-(c), (h); Rule 3-603(a); Rule 4-312(d)(1), (3); Rule 4-323(a)-(c); Rule 5-804(a)(1)-(2); Rule 6-416(a)(4), (6); Rule 6-441(b); Rule 7-116(a); Rule 9-205(b)(3), (d)(1); Rule 9-205.2(f); Rule 9-205.3(c)(1), (f)(1); Rule 10-106.1(a)-(d); Rule 14-213; Rule 14-303(a)(1)-(2), (b)-(c); Rule 16-207(e)(2), (f); Rule 16-306.1(d)-(e); Rule 16-503(a)(1); Rule 16-906(a)(5); Rule 16-912(b)-(d); Rule 19-301.17(b); and Rule 19-712(e)-(f).

That is certainly true of Rules 16-504(h)(1) and (i)(1), as those subsections' surrounding context powerfully confirms. Rule 16-504 contains two other "ordered by the court" exceptions, both of which clearly authorize action only by the presiding judge. The first, subsection (d), begins as follows: "Unless otherwise ordered by the court with the approval of the administrative judge . . . ." Far from empowering administrative judges, that clause uses the phrase "the court" in *contradistinction* to "the administrative judge." *Cf.* Rule 16-504(h)(2) ("Unless otherwise ordered by the County Administrative Judge . . . ."). And the second example, subsection (h)(3)(G), permits "a party to *the proceeding* or the attorney for a party" to obtain an unredacted audio recording, "unless ordered by the court" (emphasis added). This provision reflects the individualized nature of Rule 16-504's access regime—one in which circuit-wide administrative policies play no role.

In addition, both of subsection (h)(1)'s neighboring sub-provisions use the phrase "the court" to refer only to the presiding judge. Under subsection (g), "the court" must place safeguards on portions of recordings that "should and lawfully may be shielded from public access and inspection." And subsection (h)(2) refers to "portions of the recording that *the court* has directed be safeguarded pursuant to section (g)" (emphasis added). Of course, the presiding judge—and not the administrative judge—makes these initial redaction determinations, and does so based on personal observation of the relevant proceedings.

As a practical matter, empowering only the presiding judge to invoke Rule

16-504's "ordered by the court" exceptions—as the Rule's text requires—best accounts for the day-to-day workings of Maryland's circuit courts. Those exceptions exist for good reason: to prevent the broader disclosure of particularly sensitive information divulged at a court hearing. (Such details could include personal financial or medical information, the identity of a confidential informant, trade secrets, or a witness's home address.) The judges who actually preside over those hearings—and who have familiarized themselves with the substance of a case—are best positioned to know whether some concrete harm would result from routine compliance with Rule 16-504(h) and (i). The same is not true for administrative judges, who exercise system-wide administrative responsibilities and cannot possibly know the intimate details of all other judges' cases.[13]

III. PETITIONERS ARE ENTITLED TO DECLARATORY RELIEF.

In addition to mandamus relief, Petitioners are entitled to a declaratory judgment clarifying that Respondent presently has a non-discretionary duty to permit any person, upon written request, to (1) obtain copies of audio recordings of Charles County Circuit Court proceedings (upon payment of reasonable costs) and (2) listen to those recordings at the courthouse.

Maryland's Uniform Declaratory Judgments Act is "remedial" and must "be liberally construed and administered." Md. Cts. & Jud. Pro. § 3-402; *see also Sprenger v.*

[13] Administrative judges are, of course, authorized to invoke Rule 16-504's exceptions when presiding over specific cases in their judicial capacities.

Pub. Serv. Comm'n of Md., 400 Md. 1, 23 (2007) (recognizing "the strong legislative policy favoring the liberal use and interpretation of the Declaratory Judgments Act" (citation omitted)). The Court of Appeals has "admonished trial courts that, when a declaratory judgment [action] is brought, and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment." *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 477 (Md. 2004) (citation omitted).

Declaratory relief is warranted here because (1) Petitioners "assert[] a legal . . . right" that is "challenged or denied by [Respondent]," who, as court administrator, also has a "concrete interest" in the present dispute's resolution; and (2) a declaratory judgment would "terminate the uncertainty or controversy giving rise to the proceeding." Md. Cts. & Jud. Pro. § 3-409(a). For over fourteen years, Judge Nalley's order has operated to deprive *all* persons of rights explicitly guaranteed to them by state law. Petitioners—as well as others whose rights have been continually violated—deserve "relief from [this] uncertainty and insecurity." Md. Cts. & Jud. Pro. § 3-402. Further, no statute prescribes a "special form of remedy" when court officials fail to comply with Rule 16-504(h)(1). Md. Cts. & Jud. Pro. § 3-409(b).

For these reasons, Petitioners are entitled to a declaratory judgment clarifying that Rule 16-504's "ordered by the court" exceptions cannot be triggered by the issuance of a local administrative order.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' Motion for

Summary Judgment and issue mandamus and declaratory relief in favor of Petitioners.

September 27, 2019

Respectfully submitted,

/s/ Daniel B. Rice

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing paper will be mailed to Respondent via first-class mail on September 27, 2019.

/s/ Daniel B. Rice
DANIEL B. RICE