INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

September 5, 2019

VIA EMAIL
Hon. Debra Spisak, Clerk
Court of Appeals
Tim Curry Criminal Justice Center
401 W. Belknap, Suite 9000
Fort Worth, Texas 76196

Re: *Crystal Mason v. The State of Texas*, No. 02-18-00138-CR
Request for oral argument broadcast on September 10, 2019

Dear Ms. Spisak,

We write on behalf of HuffPost reporter Sam Levine and several other news media organizations in response to your letter dated August 29, 2019, denying Mr. Levine's request to broadcast the oral argument scheduled for September 10, 2019, in *Crystal Mason v. The State of Texas*, No. 02-18-00138-CR.[1] The sole justification you provided for the denial is that the Second Court of Appeals has chosen to adhere to its "established procedure" to deny *all* requests to record or broadcast proceedings made by members of the public. This unwritten rule conflicts with the Texas Rules of Appellate Procedure and does not provide a lawful basis for rejecting Mr. Levine's request.

Texas Rule of Appellate Procedure 14 allows members of the public to obtain permission to record or broadcast appellate proceedings. *See* Tex. R. App. P. 14.1. This Rule reflects a deliberate statewide choice to facilitate public access to appellate proceedings by allowing recording or broadcasting, subject to case-specific considerations, rather than to prohibit such access categorically. *See* Tex. R. App. P. 14 notes & comments (explaining that Rule 14 "now allows recording and broadcasting of court proceedings at the discretion of the court"). Consistent with this preference for access, Rule 14 establishes procedures that contemplate case-by-case determinations of any request to record or broadcast: The requester must provide notice to the parties that includes the type of coverage requested and the equipment to be used, and the parties then have an opportunity to object to identify any "injury that will allegedly result from coverage." Tex. R. App. P. 14.2(a)-(b). The court must make a decision based on these considerations or anything else it has learned "ex parte." Tex. R. App. P. 14(d).

The Second Court of Appeals' unwritten rule banning public recording and broadcasting in all cases unlawfully jettisons the statewide system of access and accompanying procedures embodied in Rule 14. Rule of Appellate Procedure 1.2(a) prohibits any local rule that is "inconsistent with [the Appellate] [R]ules," thereby precluding implementation of the unwritten rule, at issue here, that conflicts with Rule 14. Rule 2 further confirms that the Second Court of Appeals lacks authority to

[1] The additional news organizations include the following signatories to Mr. Levine's initial request: KUT News, The Appeal, and Talking Points Memo.

implement its blanket ban. Rule 2 permits courts to "suspend a rule's operation *in a particular case and order a different procedure*" for "good cause." Tex. R. App. P. 2 (emphasis added). Far exceeding this limited authority, the Court's prohibition on recording and broadcasting not only applies to every case without the requisite finding of good cause that Rule 2 demands, but also effectively eliminates the approval procedure entirely rather than imposing a "different" one. Thus, because the Court's unwritten rule denying access in all cases cannot be reconciled with Rule 14 and is not a permissible suspension under Rule 2, the blanket prohibition cannot provide a basis for denying Mr. Levine's request. Indeed, Texas courts have consistently disregarded local rules that conflict with statewide rules of procedure.[2]

The Second Court of Appeals' unwritten rule is unlawful for a second reason: Any local rule must "first be approved by" the Supreme Court or Court of Criminal Appeals before it is given effect. Tex. R. App. P. 1.2(a). The requirement that courts submit local rules to the Supreme Court or Court of Criminal Appeals protects the rulemaking authority of those two courts—the two that the legislature has authorized to establish procedural rules—by ensuring that they may disallow local practices that are deemed detrimental to duly promulgated statewide procedures. *See* Tex. Gov't Code § 22.108(a) ("The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases . . . ."); *id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions . . . ."). The Second Court of Appeals' prohibition ignores this safeguard against unlawful local rules and, in doing so, contravenes the legislature's intent to leave ultimate rulemaking authority with the Supreme Court and Court of Criminal Appeals. Just as courts have refused to recognize local rules that conflict with statewide rules of procedure, they have refused to give effect to rules that have not passed through the required approval processes.[3]

The foregoing establishes that the denial of Mr. Levine's request lacks any lawful basis, and we ask that you promptly reconsider his request to provide him and the other news organizations that joined his request with the case-specific determination that Rule 14 guarantees. In so doing, we urge you to consider the immense public interest in this case, at both the local and national level. Full and timely public coverage of the oral argument at issue cannot be accomplished as effectively through written reports or delayed publication of the court-provided audio recording. Additionally, we emphasize that, by seeking permission to use only a single pool camera, Mr. Levine's request will

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[2] *See, e.g.*, *Centennial Ins. Co. v. Commercial Union Ins. Cos.*, 803 S.W.2d 479, 482 (Tex. App. 1991) ("In this case, the trial court employed an unauthorized procedural mechanism to summarily dismiss appellants' action without giving appellants an opportunity to replead. This action clearly contravened both the letter and the spirit of the Texas Rules of Civil Procedure."); *Mayad v. Rizk*, 554 S.W.2d 835, 837 (Tex. Civ. App. 1977) ("The Texas Rules of Civil Procedure govern and must prevail over any provision of the local rule."); *cf. In re BP Prod. N. Am. Inc.*, 263 S.W.3d 117, 120 (Tex. App. 2006) (granting mandamus relief where trial court permitted broadcasting in the absence of parties' consent in violation of statewide rule of procedure).

[3] *See, e.g.*, *In re El Paso Healthcare Sys., Ltd.*, 225 S.W.3d 146, 152 (Tex. App. 2005) (overruling district court's order on out-of-town counsel where the court's "order [wa]s not supported by any published local rule that has been approved by the Supreme Court."); *Davis v. W.H. Davis Co.*, No. A14-93-00043-CV, 1994 WL 132771, at *5 (Tex. App. Apr. 14, 1994) (not designated for publication) ("[E]ven if appellants had properly preserved this complaint, they have not included in the record before us a certified copy of the local rules, nor have they provided evidence that these local rules have been approved by the Texas Supreme Court."). Of course, it is no answer that the Second Court of Appeals' prohibition on recording and broadcasting was unpublished. *Cf. Approximately $1,589.00 v. State*, 230 S.W.3d 871, 873 n.3, 874 (Tex. App. 2007) (holding that district court's reliance on a local rule improperly conflicted with the Rules of Civil Procedure even though the rule had not been formally adopted by the district court). In fact, unwritten local rules are *more* problematic because they make any conflict with statewide rules more difficult to detect. *Cf.* Tex. Gov't Code § 22.108(c) (requiring that criminal rules for criminal appeals be "published in the Texas Register and in the Texas Bar Journal"); *id.* § 22.004(d) (same for rules of civil procedure).

impose as minimal of a burden as possible and likely no burden at all. Indeed, no party objected to Mr. Levine's initial request. He is willing and eager to work with appropriate court personnel to ensure that this camera causes no disruption.

We would appreciate hearing of your decision by close of business Friday September 6, 2019, if feasible, as HuffPost personnel will be traveling to Fort Worth this coming weekend. Please do not hesitate to contact us should you need any further information.

Sincerely,

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