

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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WILLIAM ALAN PESNELL AND CHRISTOPHER  
HOLDER, THROUGH HIS CURATOR, GARY HOLDER,  
*Petitioners,*

v.

JILL SESSIONS, CLERK OF COURT, JENNIFER  
BOLDEN, CERTIFIED DIGITAL REPORTER, AND  
THE JUDGES OF THE 26th JUDICIAL DISTRICT  
COURT: MICHAEL O. CRAIG, JEFF R. THOMPSON,  
JEFF COX, E. CHARLES JACOBS, MICHAEL  
NERREN, AND PARKER O. SELF,  
*Respondents.*

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On Petition for a Writ of Certiorari to the Louisiana  
Second Circuit Court of Appeal

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**PETITION FOR WRIT OF CERTIORARI**

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Billy R. Pesnell Louisiana Bar Roll #10533  
*Counsel of Record*  
The Pesnell Law Firm  
(A Professional Law Corporation)  
H.C. Beck Building, Suite 1100  
400 Travis Street  
Post Office Box 1794  
Shreveport, Louisiana 71166-1794  
Telephone: (318) 226-5577  
Telecopy: (318) 226-5578  
E-mail: bill@pesnelllawfirm.com

## **I. QUESTIONS PRESENTED**

The Applicants put forth the following Questions Presented for this Court's review, to wit:

1. Whether La. R.S. 44:4(47) and the local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish can bar public access to the digital recording of a public murder trial consistent with the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.
2. Whether La. R.S. 44:4(47) and the local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish can bar access to the digital recording of a public murder trial to the convicted defendant consistent with the Sixth, and Fourteenth Amendments to the United States Constitution, where the convicted defendant acts to obtain evidence in his case for purposes of appeal and/or post-conviction relief.
3. Whether a state can alter the burdens of the parties for determinations of the validity of statutes impairing fundamental rights, and whether the State of Louisiana applied the proper burden in the case at bar.

## **II. LIST OF PARTIES TO THE PROCEEDINGS BELOW**

The parties to the proceedings below are the same parties as are listed in the caption of this case, and the caption of the case below. However, Petitioners believe that Jill Sessions, Clerk of Court for the 26<sup>th</sup> Judicial District Court in and for Bossier Parish, Louisiana, is an unnecessary party to this application.

## **III. LIST OF PROCEEDINGS IN COURTS BELOW**

1. Caption of Case: "William Alan Pesnell and Christopher Holder v. Jill Sessions, Clerk of Court, Jennifer Bolden, Certified Digital Reporter, and the Judges of the 26<sup>th</sup> Judicial District Court: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self."

Docket Number: No. 151,118.

Court: 26<sup>th</sup> Judicial District Court in and for Bossier Parish, Louisiana.

Date of Judgment: August 18, 2018.

2. Caption of Case: "William Alan Pesnell and Christopher Holder v. Jill Sessions, Clerk of Court, Jennifer Bolden, Certified Digital Reporter, and the Judges of the 26<sup>th</sup> Judicial

District Court: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self.”

Docket Number: No. 151,118.

Court: 26<sup>th</sup> Judicial District Court in and for Bossier Parish, Louisiana.

Date of Judgment: December 13, 2016.

3. Caption of Case: “William Alan Pesnell and Christopher Holder v. Jill Sessions, Clerk of Court, Jennifer Bolden, Certified Digital Reporter, and the Judges of the 26<sup>th</sup> Judicial District Court: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self.”

Docket Number: No. 51,871-CA.

Court: Louisiana Second Circuit Court of Appeals.

Date of Opinion: February 28, 2018.

4. Caption of Case: "William Alan Pesnell and Christopher Holder v. Jill Sessions, Clerk of Court, Jennifer Bolden, Certified Digital Reporter, and the Judges of the 26<sup>th</sup> Judicial District Court: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self."

Docket Number: No. 52,646-CA.

Court: Louisiana Second Circuit Court of Appeals.

Date of Opinion: May 22, 2019.

5. Caption of Case: "William Alan Pesnell and Christopher Holder v. Jill Sessions, Clerk of Court, Jennifer Bolden, Certified Digital Reporter, and the Judges of the 26<sup>th</sup> Judicial District Court: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self."

Docket Number: No. 2019-01040.

Court: Louisiana Supreme Court.

Date of Opinion: October 15, 2019.

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## **VI. CITATIONS OF OPINIONS AND ORDERS ENTERED**

1. *Pesnell v. Sessions*, 2019-01040 (La. 10/15/19), 280 So.3d 599.
2. *Pesnell v. Sessions*, 52,646 (La.App. 2 Cir. 5/22/19), 274 So.3d 697, writ den.
3. *Pesnell v. Sessions*, 51,871 (La.App. 2 Cir. 2/28/18), 246 So.3d 686.

All other orders were orders of the trial court and are found in the trial court record.

## **VII. STATEMENT OF JURISDICTION**

Petitioners seek review of the Louisiana State trial court order dismissing their case, and its companion opinion by the Second Circuit Court of Appeal, upholding that decision. The state trial court order was entered on August 18, 2018. That decision was appealed to the Louisiana Second Circuit Court of Appeals and affirmed by that court on May 22, 2019. The application for writ of certiorari or review to the Louisiana Supreme Court was denied on October 15, 2019. Plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this Petition for Writ of Certiorari within ninety days of the Louisiana Supreme Court's judgment.

Notifications under Rule 29.4(c) have been made by undersigned counsel to the Attorney General of the State of Louisiana.

## **VIII. LISTING OF CONSTITUTIONAL PROVISIONS TREATIES**

### ***STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THE CASE***

United States Constitution Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution Amendment 14:

All persons born or naturalized in the United States and subject to the jurisdiction therefor, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. R.S. 44:4(47):

(47) (a) To the physical medium or contents of any electronic storage device including any compact disc, digital video disc, jump drive, audio or video cassette tape, or any other type of electronic storage device, or to any shorthand or longhand notes or writings or stenotype paper tapes in the custody or under the control of a judge, clerk of court, official court reporter, deputy official court reporter, or certified electronic reporter and which are produced, made, or used by an official court reporter, deputy official court reporter, free lance reporter, or certified electronic reporter in any court of record of the state during any proceedings before that court to report the proceedings or for the purpose of

transcribing into typewriting those portions of the proceedings required by law or by the court to be transcribed.

(b) The provisions of Subparagraph (a) of this Paragraph shall not apply to the physical medium or contents of any electronic storage device if used or referred to in any hearing, administrative proceedings, or disciplinary proceeding, the record of which is public according to law, before the Judiciary Commission of Louisiana, the Office of Disciplinary Counsel, the Louisiana Attorney Disciplinary Board, the Board of Examiners of Certified Shorthand Reporters, or any board, hearing officer, or panel of such entities.

(c) As used in this Paragraph, the terms "official court reporter", "deputy official court reporter", "free lance reporter", and "certified electronic reporter" shall have the same meanings as provided in R.S. 13:961 and R.S. 37:2555.

## **IX. STATEMENT OF THE CASE**

The action at bar was an action brought to compel production of a copy of the data file of the criminal trial entitled "*State of Louisiana v. Christopher Wayne Holder*," number 191,414 on the docket of the 26<sup>th</sup> Judicial District Court in and for

Bossier Parish, Louisiana, Honorable Michael Nerren presiding. The data file at issue is likewise related to Probate Number 17,856 on the docket of that same court. The request was originally made by Applicants under the Louisiana public records law. The persons requesting those documents, recordings, and/or instruments were William Alan Pesnell, both for himself and on behalf of Christopher Wayne Holder in a representative capacity for obtaining documents to be used in post-conviction relief. Those requests were denied. This Statement of the Case will be broken down into subsections, which will address the pleading system in Louisiana, the factual issues concerning the letters sent and the responses, the contents of the evidence, and the actions of the trial court, the appellate court and the Louisiana Supreme Court.

A. *The Pleading System in Louisiana - Federal Errors Assigned.*

Contrary to the notice pleading system of the United States Courts, the State of Louisiana employs a fact-pleading system. Louisiana Code of Civil Procedure Article 854 provides that there are no technical forms of pleadings. Art. 854 provides that the petition provides allegations of fact. That article preserves the fact pleading system in the State of Louisiana. La. C.C.P. Art. 854, comment (a). Thus, a plaintiff must only plead the facts that are pertinent to his cause of action - a petitioner need not plead a theory of the case. *State, Div. Of Admin., Office of Facility Planning and Control v. Infinity Sur. Agency, LLC*, 2010-2264 (La. 5/10/11), 63 So.3d 940, 946. There is no special method of

pleading the unconstitutionality of a statute. *State v. Shoening*, 200-0903 (La. 10/17/00), 770 So.2d 762, 764.

Once pleaded, the trial court is required to provide such relief as is available on the record after hearing, whether the matter was pleaded or not, and whether the party prayed for that relief. See La. C.C.P. Art. 862. The Louisiana appellate court is likewise required to grant such relief as is available to a party under the facts, whether pleaded or not, and whether prayed for or not. La. C.C.P. Art. 2164; *Id.*, comment (a); *Wheeler v. Kelley*, 28,379 (La. App. 2 Cir. 11/7/95), 663 So.2d 559, 561. Accordingly, the theories of any one case need not be pleaded to any specific exactitude, so long as the facts adduced give rise to any cause of action between the parties.

In the case at bar, the arguments on the federal questions were made in the trial court briefs, in the appellate court briefs and in the Louisiana Supreme Court application in this matter.

*B. The Factual Issues Surrounding the Requests Made.*

William Alan Pesnell acted as a successor counsel of record for Christopher Holder in Probate Number 17,956 on the docket of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish, Louisiana. See *Succession of Holder*, 50,824 (La. App. 2 Cir. 8/10/16), 200 So.3d 878. The ruling in that case was contrary to the interests of Christopher Wayne Holder. That case was directly related to the case of *State v. Holder*, 50,171-KA (La. App. 2 Cir. 12/9/15), 181 So.3d 918, writ denied, 2016-KO-0092 (La. 12/16/16), 211 So.3d 1166, writ denied, 2016-KO-

0056 (La. 12/16/16), 212 So.3d 1176. Both the succession matter and the criminal matter were open, public trials. *State v. Holder* was a murder trial that involved high publicity, public attendance, attendance by the media, and reporting in various news media about the facts and decisions in that case. In *State v. Holder*, no one ever moved to close the part of the proceedings at issue, to seal any of the evidence, or to exclude any evidence or issue from the public purview. After the ruling in *State v. Holder*, it came to the attention of William Alan Pesnell that certain persons who were present during closing arguments believed that the transcript of the closing arguments presented to the court of appeal, was not correct. Accordingly, the following events transpired:

1. On June 10, 2016, William Alan Pesnell sent a letter to the Clerk of Court for the 26<sup>th</sup> Judicial District Court requesting a copy of the data file in Number 191,414, State of Louisiana v. Christopher Holder. The Clerk of Court responded designating the Court reporter as the custodian of the record.
2. On July 12, 2016, William Alan Pesnell sent a request letter to Jennifer Bolden, Court Reporter, requesting the data file in Number 191,414, State of Louisiana v. Christopher Holder.
3. The July 12 letter was apparently referred to the 26<sup>th</sup> Judicial District Judges= office, as a July 14, 2016 letter

from Melissa Fox was received stating that La. R.S. 44:4(47) excluded the record from being public. Ms. Fox referred Pesnell to a local court rule. The request for the public record was denied.

4. On August 11, 2016, Pesnell sent a letter to Judges Nerren and Self, requesting access under the local rule.
5. Ms. Fox responded again, denying the request to review the data file under the local rule, without any justification or explanation whatsoever, and making some claim that any problem with the “record” should be submitted to the Court of Appeal.
6. A final letter was submitted on September 1, 2016, requesting reconsideration given the due process concerns of a questionable tape and transcript, and given the public nature of the proceeding.

The parties to the letters clearly disagreed on the meaning of La. R.S. 44:4(47). All requests were denied, even the request to listen to the recording under the supervision of the Court. The request to listen to the recording under the local court rule was summarily denied without explanation or reason.

Suit was filed to compel the disclosure. The suit named as defendants the Clerk of Court for the 26<sup>th</sup> Judicial District Court, the Court Reporter for

the criminal trial at issue, and the Judges of the 26<sup>th</sup> Judicial District Court, all as custodians of the records sought in the requests. The suit included the affidavits of the persons who indicated that the transcript was not correct. The petition further specifically alleged that La. R.S. 44:4(47) did not provide an exception to the public records request, and that if it did, then such exception was unconstitutional as a denial of due process and a denial of access to records of public events and substantial public concern. The pleading was properly served on the Louisiana Attorney General who chose not to participate in the litigation.

*C. The Evidence and What It Discloses.*

At trial, the petition was introduced into evidence together with all of its exhibits, including the affidavits of the witnesses who attested to the fact that the objection made in closing argument was not in the transcript. Also introduced were certain miscellaneous matters, such as the orders appointing Gary Holder to be the curator of Christopher Holder base on Christopher Holder's mental capacity, and certain items requested by the Clerk of Court. The evidence in this matter discloses the following:

1. That Christopher Holder was convicted of murder in number 191,414, and that he had been negatively affected in probate number 17,856.
2. That William Alan Pesnell had acted as counsel for Holder the *Succession of*

*Holder*, number 17,856.

3. That certain individuals had claimed that the transcript of the criminal trial, number 191,414, was not an accurate record of what had transpired during the criminal trial, and the affidavits were attached.
4. That Christopher Holder has a due process interest in being able to listen to and test the data file recording of the criminal trial.
5. That William Alan Pesnell was a licensed attorney barred by the State of Louisiana, and actively participating in petitioning the courts of the State of Louisiana.
6. That the criminal trial had been a public trial attended by the public, including television station reporters.
7. That substantial public interests surrounded this matter, including whether a trial had been properly conducted, whether a defense had been properly presented, whether the transcript was in error, and whether the data file recording had been altered or if Affiants were simply incorrect. That substantial private interests were also at stake.

8. All of the letters and responses refusing the records requests of your applicants.
9. That the exception invoked by Ms. Fox and the Defendant Judges did not provide the exception as read by the Defendant Judges, and if so, then Applicants claimed that La. R.S. 44:4(47) was unconstitutional.
10. The Petition named the Clerk of Court, the Court Reporter and the Defendant Judges as the proper defendants in this action. Petition, *seriatim*.
11. That the local court rule in this matter is likewise unconstitutional, and as utilized in this case, arbitrary and capricious.

The petition, as amended, and evidence clearly set forth that: (i) the documents sought are a public records, (ii) the documents were formally requested by petitioners under the Public Records Law, (iii) the persons from whom the documents were sought were the custodians of the records, (iv) the exception was unconstitutional on its face and as applied, as was the local court rule, violating due process rights and access rights.<sup>1</sup> As can be seen from the briefs submitted in this matter, the claims included not only the state constitutional provisions, but also federal due process rights, the First Amendment to

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<sup>1</sup> At issue in the murder trial was the potential verdict of not guilty by reason of insanity.

the United States Constitution, the 6<sup>th</sup> Amendment right to a public trial under the United States Constitution, and the United States Constitution's 14<sup>th</sup> Amendment rights of due process, public trials, and freedoms of speech and press. As noted in the petition, the records were not produced specifically due to La. R.S. 44:4(47), and the petitioners were aggrieved by the non-production and were harmed by the same. Plaintiffs sought a declaration that the exception should be read in a limited manner and read not to apply where a transcript had been made of the recording, and alternatively, that the exception and the local court rule are unconstitutional on their face and as applied. The pleadings together with other exhibits were entered into the evidence of this matter. Defendants offered no evidence to contradict those items.

Filed into the trial court and appellate records of this matter were the various briefs and arguments made to the various courts, clearly setting forth the pertinent federal issues brought to this Court.

*C. The Actions of the Louisiana Courts.*

The trial court found that the burden of proving the statute was unconstitutional was not met, and that the statute was constitutional. Therefore, the trial court dismissed the case on an exception. Ex. 3. The Louisiana court of appeal likewise found that the statute was constitutional and that the burden of proof was not met, and therefore affirmed the decision of the trial court. The court of appeal additionally found that the alternative construction of the statute offered by Applicants was not correct, and that the statute

barred access to the data file altogether. The Louisiana Supreme Court denied the application for a writ of certiorari on October 15, 2019.

The trial court decision completely ignored the federal constitutional issues in this case. *Id.* Likewise, the court of appeal decision completely ignores the federal issues in this case. Ex. 2. The Louisiana Supreme Court failed to correct the issues. Notably, both the trial court and the appellate court purport to find that the “privacy rights” of persons in the courtroom – a public courtroom, mind you - are protected by the statute at issue because some things might be picked up by the “sensitive” recording device used in making the digital recording of the public proceedings. Sine explicandum, the Louisiana trial and appellate courts in this case find that those asserted alleged privacy interests<sup>2</sup> are sufficient to outweigh the murder defendant’s due process rights, public trial rights, and the public’s First and 14<sup>th</sup> Amendment rights to access to judicial documents. The decisions create a “star chamber” where the proceedings can

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<sup>2</sup> It is difficult to comprehend what could possibly be recorded in a public courtroom at a public murder trial that would be of any sort of significance as to privacy. The venue is public. The only thing mentioned by the trial court and the appellate court are “whispered” conversations between counsel and client, and side-bar conversations between the court and the counsel. However, it is axiomatic that the defendant whose rights to privacy are to be protected is one of the petitioners in this matter, and therefore has waived any such claimed privacy rights. The side-bar conversations should be in the transcript for full review, although they may not be evidentiary. Finally, there is no privacy right to those conversations either, as they include a tripartite collaboration, nothing of which is intended to be confidential nor should it be in a public murder trial.

be manipulated without public review, and without recourse to a substantially affected defendant in those proceedings.

## **X. REASONS AND ARGUMENT**

- (1). *Whether La. R.S. 44:4(47) and the local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish can bar public access to the digital recording of a public murder trial consistent with the First, Sixth and Fourteenth Amendments of the United States Constitution.*

Despite the fact that the federal issues pend in this matter and the issues were briefed before the various courts of the state of Louisiana, not one of those courts ever addressed those issues. The issues addressed included the due process rights of Christopher Holder, the public trial rights of Christopher Holder, and the First Amendment rights of William Alan Pesnell to access the digital recording of the murder proceedings. This is not a case seeking an advisory opinion. The matter came to light upon receipt of the transcript of the closing arguments in the murder trial, and the fact that two persons executed affidavits swearing that the transcript did not include a material objection, response and ruling made during those closing arguments. That prejudicial comments made during closing arguments of a criminal trial might improperly affect the outcome of a case is not a new thesis. Comments made and objected to in front of the jury can be prejudicial and effect a reversal of

the trial court determination of guilt. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Even the state of Louisiana has accepted that ideation. See La. C.Cr.P. Art. 774 (no appeal to prejudice); *State v. Kaufman*, 304 So.2d 300 (La. 1974).

In the case at bar, it was represented in sworn affidavits that a material objection was made during closing arguments and that the objection did not appear in the typed transcript of the proceeding. The comments were alleged to concern not only the ability of the defendant to ultimately be freed if he were found not guilty by reason of insanity,<sup>3</sup> but also comments that the system was corrupt and that a corrupt expert would be found to announce later the defendant's mental sanity for the very purpose of walking free. Based on the affidavits, William Alan Pesnell made a Louisiana public records request for himself and Christopher Holder for a copy of the digital recording. As the pleadings disclose and as the ancillary cases disclose, Christopher Holder was (1) the defendant in the murder trial, (2) a party to the succession proceeding of the decedent wherein he was negatively affected, and (3) at the time of the request, he was a "person" under the public records statute and continued to have rights under that statute during his post-conviction relief periods. His conviction was not final for post-conviction relief purposes until December 16, 2016. *State v. Holder, supra.*

William Alan Pesnell was the counsel for

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<sup>3</sup> Most certainly there is clear evidence of mental incapacity here, where the defendant Christopher Holder had to be interdicted while in prison due to his substantial mental impairment.

Christopher Holder in the succession proceeding. Further, William Alan Pesnell is a member of the public in good standing, and, as disclosed by the pleadings of the succession matter as well as the pleadings in the state court in this matter, he is a member of the bar of the state of Louisiana whose job it is to petition the government for redress. Moreover, he has a heightened interest in the fairness and proper operation of the judicial system in which he participates directly.

The requests at issue were made under Louisiana's public records law. In particular, the public records law defines a public record as follows:

A(2)(a) All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or

order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records", except as otherwise provided in this Chapter or the Constitution of Louisiana." La. R.S. 44:1(A)(2)(a).

The requests made for the data file were rejected based on La. R.S. 44:4(47) which reads as follows:

"This Chapter shall not apply...

(47)(a) To the physical medium or contents of any electronic storage device including any compact disc, digital video disc, jump drive, audio or video cassette tape, or any other type of electronic storage device, or to any shorthand or longhand notes or writings or stenotype paper tapes in the custody or under the control of a judge, clerk of court, official court reporter, deputy official court reporter, or certified electronic reporter and which are produced, made, or used by an official court reporter, deputy official court reporter, free-lance reporter, or certified electronic reporter in any court of record of the state during any proceedings before that court to report the proceedings or for the purpose of transcribing into typewriting those portions of the proceedings required by

law or by the court to be transcribed.

(b) The provisions of Subparagraph (a) of this Paragraph shall not apply to the physical medium or contents of any electronic storage device if used or referred to in any hearing, administrative proceedings, or disciplinary proceeding, the record of which is public according to law, before the Judiciary Commission of Louisiana, the Office of Disciplinary Counsel, the Louisiana Attorney Disciplinary Board, the Board of Examiners of Certified Shorthand Reporters, or any board, hearing officer, or panel of such entities.”

In denying the requests, the defendants<sup>4</sup> cited and relied solely on La. R.S. 44:4(47).<sup>5</sup> That was the finding of the trial court, it was never appealed and has been acquiesced in by the judges.

As noted above, the trial court, the court of appeal and the Louisiana Supreme Court each ignored the claims arising under the First Amendment to the United States Constitution.<sup>6</sup> The

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<sup>4</sup> The Clerk of Court was dismissed from this action without objection. Accordingly, nothing surrounding that part of the decision is subject to the requested review herein.

<sup>5</sup> Under the public records law of the state of Louisiana it is undisputed that the defendant judges are the custodians of the record at issue.

<sup>6</sup> The refusal to address the issue is staggering, especially by the Second Circuit Court of Appeal, given the fact that the Second Circuit Court of Appeal has already recognized the

State of Louisiana clearly understands the supremacy clause of the United States Constitution. The Louisiana courts have already recognized that the state constitution cannot be interpreted to provide less protection than the United States Constitution. See *Louisiana Associated General Contractors, Inc. v. State through Div. of Admin., Office of State Purchasing*, 95-CA-2105 (La. 3/8/96), 669, So.2d 1185, 1196. Yet, in this case the state courts ignored the federal constitutional considerations altogether. In this case, access was sought to the data file digital recording of the trial proceedings. This is not a traditional document covered by court rulings. However, it is the compendium of all acts that took place in the trial court and the source of the record for appellate review and discretionary review. It is the source to which any transcript must be compared for accuracy.

One of the principal arguments by the defendants below was that the United States Supreme Court has never declared that there is a First Amendment right to judicial documents. Yet, that is not completely accurate. This Court found a “presumption of openness” that inheres in the very nature of a criminal trial. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). In fact, this Court has recognized the very public nature of a criminal trial, recognizing that it is the public that is the ultimate owner of such proceedings. See *Craig v. Harney*, 331 U.S. 367, 374, (1947).

Virtually every federal circuit in the nation

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First Amendment right to access to court documents. See *State v. Widenhouse*, 21,605-KW (La. App. 2 Cir. 1/22/90), 556 So.2d 187, 189-190 (right of access recognized on First Amendment grounds and Art. 1, §7 of the Louisiana Constitution).

has recognized the right of access under the First Amendment. See *Pearson v. James*, 105 F.3d 828 (2d Cir. 1997); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972, cert. den. 409 U.S. 991 (1972); *In re Knight Pub. Co.*, 743 F.2d 231 (4<sup>th</sup> Cir. 1984); *In re Washington Post Co.*, 807 F.2d 383 (4<sup>th</sup> Cir. 1986); *United States v. Edwards*, 785 F.2d 1293 (5<sup>th</sup> Cir. 1997); *United States v. Hitt*, 473 F.3d 146 (5<sup>th</sup> Cir. 2006); *United States v. Ladd*, 218 F.3d 701 (7<sup>th</sup> Cir. 2000)(strong presumption that all trial proceedings should be subject to scrutiny by the public; at p. 703-704); *United States v. Thunder*, 438 F.3d 866 (8<sup>th</sup> Cir. 2006).

Specifically, this Court and certain of the circuits have found that the right of access goes as far as the right to inspect and copy public records and documents including judicial records and documents.<sup>7</sup> *Nixon v. Warner Commc's*, 435 U.S. 589, 597 (1978); *Lugosch v. Pyramid Co. Of Onandaga*, 435 F.3d 110, 119-120 (2d Cir 2006); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004); *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 924 F.3d 662 (3d Cir. 2019); *U.S. v. Index Newspapers LLC*, 766 F.3d 1072 (9<sup>th</sup> Cir. 2014); *Doe v. Public Citizen*, 749 F.3d 246 (4<sup>th</sup> Cir. 2014); *SEC v. American Intern. Group*, 712 F.3d 1 (D.C. Cir. 2013); *In re Giotto Global Corp.*, 422 F.3d 1 (1<sup>st</sup> Cir. 2005). In order to secure access, the Second Circuit has used two (2) tests. *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009). If one can show that the record has been

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<sup>7</sup> That access is not only rooted in the First Amendment but also in the common law, as noted in the cases.

traditionally open to the public and where public access would play a significant positive role in the functioning of the particular process in question, then access is available under the First Amendment test. *Id.* Second if the records sought are derived from or a necessary corollary of the capacity to attend the relevant proceeding, then they are available. *Id.*

Access to the data file recording satisfies both tests. Evidence of the occurrences at a public trial have always been afforded access. In the case at bar, the process of making a transcript of that underlying tape clearly plays a significant and positive role in the functioning of the process of the proper preservation of evidence and due process. As noted by one federal district court, “Transparency is pivotal to public perception of the judiciary’s legitimacy and independence.” *United States v. Madoff*, 626 F.Supp.2d 420 (SDNY 2009). Further, the transcript at issue is derived from the digital recording sought, and the making of the transcript is a necessary corollary of making the digital recording. That information could be gathered by any person in public attendance. The right should extend to the underlying data, especially in a case where claims are made that the transcript is not accurate as to what actually occurred in that courthouse. The document sought is the *critical and substantial document that is a compendium and record of the facts and testimony forming the basis of a public trial*. As noted by one court in a similar situation, “...It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it

extends only to those who can squeeze through the door?” *U.S. v. Antar*, 38 F.3d 1348 (3d Cir. 1994). The First Amendment right exists to protect the public against the government’s arbitrary interference with access to important information. *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013).

The digital recording data file is a judicial record. The Louisiana legislature cannot impair a citizen’s fundamental First Amendment right, nor the common law right, without following the procedures required for passing statutes that impact fundamental rights. Further, the public trial rights of Christopher Holder hold course here as well, as discussed below. The 14<sup>th</sup> Amendment makes these matters binding on the states and thus, the First, Sixth and Fourteenth Amendments to the United States Constitution compel a reversal of the trial court decision and the decision of the Louisiana Court of Appeal. As shown below, the Louisiana courts impermissibly burdened the plaintiffs below with the whole burden of proof, despite the fact that the evidence clearly shifted the burden as discussed below. The courts ignored the federal issues, instead of following the dictates of this Court and other federal courts where fundamental rights have been affected. As limited by the appellate court in this case, the statute is unconstitutional on its face providing for an absolute bar to the document. Alternatively, it is unconstitutional as applied in this case given the impingement on the First Amendment rights of applicants, and for the reasons below.

(2). *Whether La. R.S. 44:4(47) and the local*

*rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish can bar access to the digital recording of a public murder trial to the convicted defendant consistent with the Sixth, and Fourteenth Amendments to the United States Constitution, where the convicted defendant acts to obtain evidence in his case for purposes of appeal and/or post-conviction relief.*

All of the foregoing arguments are incorporated herein. The Sixth Amendment provides for a public trial. The Fourteenth Amendment provides that due process is applicable to the states, including the public trial rights of the Sixth Amendment. See *Waller v. Georgia*, 467 U.S. 39, 40-41 (1984). Clearly, Christopher Holder has a right to obtain evidence pertinent to his case for post-conviction relief purposes. The Louisiana public records law recognizes that right, and La. R.S. 44:31.1 provides that

For the purposes of this Chapter, a **person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post-conviction relief** under Code of Criminal Procedure Article 930.3.....

Yet, the legislature foreclosed that relief as to the digital recording of the criminal trial proceedings in 2012 when La. R.S. 44:4(47) was enacted. R.S. 44:4(47) is sweeping in its coverage and provides for no exceptions. Thus, matters such as the one at bar, which are pertinent for post-conviction relief, cannot be explored or brought to light if they are buried in the data file. The legislature has cut off access to judicial documents necessary for post-conviction relief in the very statute it had already recognized was important to convicted felons who required evidence in post-conviction relief situations.

The federal courts have recognized a right to access to judicial documents under the public trial rights provisions of the United States Constitution. Those rights are strangely similar to the First Amendment rights discussed above. See *Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5<sup>th</sup> Cir. 1984); *Huminski v. Corsones, et al.*, 396 F.3d 53 (2d Cir. 2005). That an error in an appellate transcript is reversible error is not subject to reasonable dispute. *Chessman v. Teets*, 354 U.S. 156, 77 S.Ct. 1127 (1957). See also, *United States v. Wilson*, 16 F.3d 1027 (9<sup>th</sup> Cir. 1994) (failure of court reporter to file accurate and reliable transcript a violation of due process). Accordingly, the discovery of a material defect in the transcript at issue is clearly an issue for post-conviction relief. The public records law of Louisiana appears to recognize that issue, but then stripped that avenue of relief away, with the stroke of a pen and without any substantial justification whatsoever. Christopher Holder requires access to that judicial record for purposes of post-conviction relief, and the clock is ticking. There is a substantial due process question before the Court.

(3). *Whether a state can alter the burdens of the parties for determinations of the validity of statutes impairing fundamental rights, and whether the State of Louisiana applied the proper burden in the case at bar.*

In the case at bar, the court of appeals and the trial court placed the burden of proof that La. R.S. 44:4(47) was unconstitutional on your applicants. Yet, the trial court and the appellate courts failed to shift that burden once the requisite standing was shown. The standards set out by this Court require a compelling government purpose for any statute which infringes on a fundamental right, and the statute must be narrowly tailored to achieve that compelling purpose. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

In the case at bar, once the petition, exhibits and affidavits were entered into evidence, the *prima facia* case of the petitioners in the trial court was established. They had standing. Applicants requested the documents and were denied specifically because of the statute at issue. The claims show that the statute is infringing on fundamental rights. If the burden were ever properly on applicants, that burden was then shifted to the Judges and the court reporter to show a compelling government interest, and to show that the statute was narrowly tailored to achieve that interest. Yet, no defendant offered any reason whatsoever for the statute in an evidentiary fashion. The only supposed justification offered was done in argument. Applicants believe that there is no

substantial justification for the statute, and in fact, that the statute was a legislative reaction to the Louisiana courts' decision in *Labat v. Larose*, 2011-0957 (La. App. 1 Cir. 12/21/11), 2011 WL 6754090 (audio recording of court proceeding is a public record subject to disclosure under the Public Records Law; judge must provide copy of recording). In that case a district judge was found liable for refusing to turn over the digital recording in a case much like the one at bar. Applicants believe that the adoption of La. R.S. 44:4(47) was merely a reaction to the *Labat* case, as no substantial justification exists for the absolute bar to access in light of this Court's directives.

In this case, the trial court and the appellate court found that there were privacy interests at stake which were somehow more important than a criminal defendant's interests against deprivations of liberty, and the public's interest in whether the judicial system functions properly. At stake are a murder conviction and a life sentence - deprivations of fundamental liberty interests extolled by the state. At stake are the public's right to know that the judicial system is valid, fair, and transparent. The reasons given by the trial court and the appellate court simply have no merit. Any privacy concerns about a client "whispering" to a lawyer belong to Mr. Holder, and he waives those concerns when he seeks the transcripts. Any side bar conferences are not sufficient reason to limit access to the tape, unless it is the side bar that the state does not want discovered. Any other person in a courtroom has no privacy interest in comments uttered in a public forum. One would hope that there were no unilateral side-bar conferences, but

one cannot find out without access to the tape. Moreover, those reasons are superfluous, in light of the fact that it is the court's recording machine. The court can manipulate that machine to NOT record those items, and if not, it should give fair warning to those in attendance that there is no right to privacy in a public courtroom. Nothing cited by the trial court or the appellate court are protected matters. The reasons are frivolous. Finally, an absolute bar clearly violates this Court's requirement that any statute impairing fundamental rights be narrowly tailored. Accordingly, neither the defendants below nor the State have proposed anything that would support the statute at issue.

Likewise, the Louisiana trial and appellate courts' failure to address the issues under the 26<sup>th</sup> Judicial District court's local rule fail for all of the above reasons. The decision was arbitrary and capricious and detailed no reasons whatsoever for the denial, rendering it as infirm as the statute at issue herein. A regulation is unconstitutional where the rule has no minimum standards by which to judge a violation of that rule. "Where the legislature fails to establish minimum guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 1859 (1983). Notably, the courts have prohibited statutes that carry with them the "...ever-present potential for arbitrarily suppressing First Amendment liberties..." bearing the "...hallmark of a police state." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 213 (1965). That reasoning should be no less applicable to an administrative court rule. In this case, the

rule allows the Judges to “... pursue their personal predilections...” As proven by the judge’s actions in this case, the rule is simply at the whim of the judge.

## **XI. CONCLUSION**

For the reasons set forth above, there are substantial issues surrounding the constitutionality of La. R.S. 44:4(47). This Court has never declared the extent of the First Amendment right to access to judicial documents nor the Sixth Amendment public trial access rights to judicial documents insofar as the tape of the proceeding in concerned. The document is a judicial document of a public murder trial that was never sealed to the public. The document is the central document of the trial and includes all trial proceedings and testimony. There is a direct claim that the transcript of the closing arguments is incorrect and fails to contain a material objection to closing statements.<sup>10</sup> This Court should accept this writ application and set this matter down for briefing and argument.

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<sup>10</sup> This is not a case of a mis-remembered portion of a trial or misplaced objection. Affiant Gary Holder was excluded from all portions of the trial *except* the closing arguments. Therefore, it could not be an objection that occurred at some other time in the trial process.

Respectfully submitted,

By: /s/ Billy R. Pesnell  
Billy R. Pesnell  
*Counsel of Record*  
Louisiana Bar Roll No.10533  
THE PESNELL LAW FIRM  
(A Professional Law Corporation)  
H. C. Beck Building, Suite 1100  
400 Travis Street  
Post Office Box 1794  
Shreveport, Louisiana 71166-1794  
Telephone: 318/226-5577  
Telecopy: 318/226-5578

Attorneys for Plaintiffs/Applicants William Alan  
Pesnell and Gary Holder