

APPENDIX A

**STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700**

[STAMP]
Illegible

Glenn Louis Langley
ANGLEY PARKS HORTON ET AL
401 Market St., Suite 1100
Shreveport, LA 71101

James Dell Southerland
SOUTHERLAND & SIMMONS
P. O. Box 338
Benton, LA 71006-0000

Patrick Richmond Jackson
PATRICK R. JACKSON, APLC
4442 Viking Drive, #100
Bossier City, LA 71111

Jill Sessions
Bossier Parish Clerk of Court
P. O. Box 430
Benton, LA 71006-0430

David G. Sanders

LOUISIANA DEPT. OF JUSTICE
P. O. Box 94005
Baton Rouge, LA 70804-9005

William Alan Pesnell
THE PESNELL LAW FIRM, APLC
P. O. Box 1794
Shreveport, LA 71166-1794

Julianna Petchak Parks
ANGLEY PARKS HORTON ET AL
401 Market St., Suite 1100
Shreveport, LA 71101

Eric R. Harrington
Ad Hoc Judge - 26th JDC
P. O. Box 310
Benton, LA 71006

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

May 22, 2019

DOCKET Number: CA 18-52646

WILLIAM ALAN PESNELL AND
CHRISTOPHER HOLDER

VERSUS

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

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Clerk of Court

Judgment rendered May 22, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,646-CA

**COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA**

WILLIAM ALAN PESNELL Plaintiffs-Appellants
and CHRISTOPHER HOLDER

versus

JILL SESSIONS, CLERK OF Defendants-Appellees
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

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 151,118

Honorable Eric R. Harrington (*Ad Hoc*), Judge

THE PESNELL LAW FIRM, A.P.L.C.

DAVID G. SANDERS
Assistant Attorney General

LANGLEY, PARKS & MAXWELL
LLC Counsel for Appellee
By: Glenn L. Langley Jill Sessions,
Julianna Petchak Parks Clerk of Court

JAMES D. SOUTHERLAND

* * * *

Before PITMAN, STONE, and BLEICH (*Ad Hoc*), JJ.

PITMAN, J.

Plaintiffs-Appellants William Alan Pesnell and Christopher Holder appeal the trial court's judgment sustaining the exceptions of no cause of action filed by Defendants-Appellees 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 ("the Judges"). Sessions has filed a motion to dismiss for lack of jurisdiction and an exception of res judicata. For the following reasons, we grant Sessions's motion to dismiss and affirm the judgment of the trial court as to Bolden and the Judges.

FACTS

Holder was convicted of the second degree murder of his mother. On appeal, this court affirmed his conviction and sentence. *State v. Holder*, 50,171 (La. App. 2 Cir. 12/9/15), 181 So. 3d 918, *writs denied*, 16-0092 (La. 12/16/16), 211 So. 3d 1166, and 16-0056 (La. 12/16/16), 212 So. 3d 1176. Holder's uncle opened the intestate succession of Holder's mother and asked that Holder be declared unworthy to inherit from his mother. The trial court granted a motion for summary judgment, finding Holder was convicted of the intentional killing of his mother. This court affirmed the judgment of the trial court. *In re Succession of Holder*, 50,824 (La. App. 2 Cir. 8/10/16), 200 So. 3d 878, *writ denied*, 16-1694 (La. 12/16/16), 212 So. 3d 1169.

On September 22, 2016, Pesnell and Holder filed against Defendants a petition to declare provision of public records law unconstitutional in substance and as applied, and to compel production of public record

for inspection and testing.¹ They claimed that persons who were present at Holder's criminal trial did not believe that the transcript of the trial was correct. They stated that an objection was missing from the transcript and language attributed to the prosecutor was not correct and that these substantive issues could alter the outcomes of the criminal and succession proceedings. They argued that they had a right to listen to, review and test the data file recording of the criminal trial ("the recording").

The petition detailed Pesnell's efforts to acquire the recording. He sent a letter to Sessions as the clerk of court and was advised to make the request to the court reporter. He requested the recording from Bolden, the court reporter, and received a response from Melissa Fox, the court administrator and senior staff attorney for the 26th Judicial District Court. Fox advised him that the request was not covered by the Public Records Law, citing La. R.S. 44:4(47) and the Listening to Recordings Policy of the 26th Judicial District Court ("the court's policy").² Pesnell then

¹ Plaintiffs amended their petition to add the State of Louisiana as a defendant. The State filed an exception of lack of subject matter jurisdiction and no cause of action. The trial court granted the State's exceptions, and on appeal, this court affirmed the trial court's sustaining of these exceptions. *Pesnell v. Sessions*, 51,871 (La. App. 2 Cir. 2/28/18). 246 So. 3d 686.

² The court's policy states:

It is the position of the 26th Judicial District Court that no party, attorney or witness,

requested to listen to the recording pursuant to the court's policy, and Fox responded that Judge Nerren denied his request, informing him that any questions as to the content and form of the recording should be presented to the court of appeal.

Plaintiffs argued that La. R.S. 44:4(47) does not provide an applicable exception to the Public Records Law in this case and that the recording is a public record subject to public review. They contended that if La. R.S. 44:4(47) provides an exception in this case, then the statute is unconstitutional because it denies due process to litigants and denies public access to records of public events. Plaintiffs also found fault with the court's policy. They argued that Defendants should be ordered to turn over a copy of the recording

or any other interested person, be allowed to listen to the playback of any recording of any court proceeding. Under extraordinary circumstances, with permission from the Court, exceptions can be made to hear excerpts of proceedings. If permission is granted, the court reporter should listen to the recording first to ensure that there is no audible conversation between attorney and client. Due to the sensitivity of the digital recording, conversations between counsel and client can potentially be audible on the recording, which playback of said conversation could potentially breach attorney/client privilege. This policy excludes judges and court staff that have to rely on the recording for preparation of documents, transcripts or subsequent court proceeding. However, the information gleaned from listening of recorded proceedings is to remain confidential.

or, in the alternative, that they should be allowed to review the recording for comparison to the transcript.

On October 17, 2016, the Judges filed an exception of no cause of action. They argued that because the Public Records Law does not apply to the recording sought, Plaintiffs have no right of access to it. They stated that Plaintiffs had no right to access the recording pursuant to the court's policy because the court denied permission. They contended that the recourse available to Plaintiffs is to obtain an order from the appellate court, not to sue the Judges. The Judges noted Plaintiffs' attempt to have La. R.S. 44:4(47) declared unconstitutional and responded that they have no interest in, or enforcement powers with respect to, the Public Records Law.

On November 2, 2016, Sessions filed an exception of no cause of action. She stated that, as clerk of court, she is the keeper of the written records of the trial, but not the keeper of, and does not have access to, the electronic recordings of the trial.

On November 18, 2016, Bolden filed an exception of no cause of action. She stated that she is not the custodian of the recording, that she has no discretion to secure the recording and that all of her duties are ministerial.

On November 28, 2016, Plaintiffs filed an opposition to the exceptions of no cause of action. On December 13, 2016, the trial court filed a judgment maintaining the exception of no cause of action filed by

Sessions and dismissing Plaintiffs' proceedings against Sessions.

On December 23, 2016, the trial court signed a judgment. It stated that Bolden is not a proper party defendant and dismissed Plaintiffs' claims against her. It found that the Judges are the custodians of the records sought but that pursuant to La. R.S. 44:4(47) and the court's policy, Plaintiffs have no right to the recording. Therefore, it found that no cause of action had been stated and dismissed Plaintiffs' claims under the Public Records Law. The trial court reserved for a later date the claims that La. R.S. 44:4(47) and the court's policy are unconstitutional.

On January 11, 2017, Plaintiffs filed a motion for new trial or rehearing as to the December 23, 2016 judgment and argued that the judgment was erroneous.

On March 3, 2017, Plaintiffs filed a motion to appeal the December 23, 2016 judgment.

On appeal, this court reversed the exceptions of no cause of action filed by Sessions, Bolden and the Judges and remanded the matter for further proceedings, i.e., a ruling on the constitutionality of La. R.S. 44:4(47) and for further relief if necessary. *Pesnell v. Sessions*, 51,871 (La. App. 2 Cir. 2/28/18), 246 So. 3d 686.

On remand, a hearing was held on July 6, 2018, as to the constitutionality of La. R.S. 44:4(47). On

August 18, 2018, the trial court signed a ruling and judgment sustaining the exceptions of no cause of action to the extent that they are based on La. R.S. 44:4(47). It found that Plaintiffs failed to prove that La. R.S. 44:4(47) is unconstitutional as applied to them and that their petition failed to state a cause of action. It noted that Plaintiffs emphasized their need for the recording based on due process and other constitutional rights. It found that a records custodian is prohibited from inquiring as to a person's reason for requesting public records under the Public Records Law and, therefore, applied La. R.S. 44:4(47) to Plaintiffs' request as it would be applied to any other member of the public's request. The trial court found that La. R.S. 44:4(47) validly serves to protect the constitutional privacy rights of all litigants. It explained that if an audio recording could be disclosed to any person requesting it, every comment picked up by the recording device, including whispered conversations between a defendant and his counsel or a sidebar conference with the judge, would become a public record. It assumed that this is why the official record of a court proceeding is a certified transcript, not an unedited, uncensored recording. It also found that La. R.S. 44:4(47) is not overly broad and that it conforms to the intent and purpose of the statute.

Plaintiffs appeal the August 18, 2018 judgment.

SESSIONS'S MOTION TO DISMISS

On February 22, 2019, Sessions filed, with this court, a motion to dismiss for lack of jurisdiction and

an exception of res judicata. She noted that Plaintiffs did not timely file a motion to appeal the December 13, 2016 judgment in which the trial court granted her exception of no cause of action and dismissed Plaintiffs' proceedings against her. She stated that although this court did not have jurisdiction as to the December 13, 2016 judgment, it reversed the judgment in *Pesnell v. Sessions, supra*. She filed an application for rehearing; and, in response, Plaintiffs admitted that the judgment dismissing her from the action was final prior to the appeal of the other judgments, that she should not have been a party to the appeal and that her motion for rehearing should be granted. This court denied Sessions's motion for rehearing. She argued that as the December 13, 2016 judgment was not appealed within the appeal delays and is a final judgment, the decision is res judicata. Therefore, she contended that she should be dismissed from the instant appeal. On March 19, 2019, this court filed an order referring these matters to the merits of the appeal.

Plaintiffs did not file a motion to appeal the December 13, 2016 judgment within the time delays provided in La. C.C.P. arts. 2087 and 2123. Therefore, the December 13, 2016 judgment, which dismissed Plaintiffs' proceedings against Sessions, is a final judgment and conclusive between the parties. La. R.S. 13:4231.

Accordingly, we grant Sessions's motion to dismiss.

PLAINTIFFS' ASSIGNMENTS OF ERROR³

Statutory Construction

In their first assignment of error, Plaintiffs argue that the trial court erred in dismissing the claims related to the statutory construction of La. R.S. 44:4(47). They contend that the recording is a public record. They state that the Public Records Law and provisions of the Louisiana Constitution that require a review and complete record of any criminal trial are to be construed liberally in favor of public access and that exceptions must be narrowly construed in favor of disclosure. Plaintiffs contend that the portion of La. R.S. 44:4(47)(a) that states that the exclusion applies to any such media used "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" means that the recording is excluded from disclosure until it is transcribed or reported. Plaintiffs argue that once the proceeding is transcribed or reported, there is no reason to limit access, as the contents are transcribed and certified. They state that this court should limit the exception to Plaintiffs' reading of the statute and order production of the recording.

The Judges argue that La. R.S. 44:4(47) is constitutional and that the recording sought by Plaintiffs is expressly excepted from being a public

³ Sessions and Bolden both submitted briefs, but did not respond specifically to each of Plaintiffs' assignments of error.

record. They contend that the legislature had rational reasons for enacting La. R.S. 44:4(47), i.e., to protect the physical medium of recording, to prevent the alteration of the recording and subsequent release to the public and the need to protect conversations picked up by the recording device, including those between attorney and client.

Bolden argues that La. R.S. 44:4(47) should not be construed to apply only until the recording has been transcribed but, instead, should not be time-limited.

La. R.S. 44: 1 (A)(2)(a) defines "public records" as the term is used in the Public Records Law as follows:

*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.*

(Emphasis added.)

La. R.S. 44:4(47)(a) provides an exception to La. R.S. 44(l)(A)(2) and states that the Public Records Law shall not apply:

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.

A review of La. R.S. 44:4(47) supports Defendants' argument that the recording is not a public record pursuant to the Public Records Law. This exception to the Public Records Law is not limited to the time before the recording is transcribed, as argued by Plaintiffs. To the contrary, the statute provides no time limitation to the exception to the Public Records Law. Although Plaintiffs contend that there is no reason to limit access to the recording once it has been transcribed, the trial court disagreed and noted that the exception in La. R.S. 44:4(47) protects the privacy of all litigants. We find that the trial court did not err in its interpretation of La. R.S. 44:4(47).

Accordingly, this assignment of error lacks merit.

Amendment by Statute

In their second assignment of error, Plaintiffs argue that the trial court erred in holding that the rights under La. Const. art. XII, §3, may be freely amended by statute. They state that the trial court improperly relied on the notion that the legislature may amend the constitution at will and without regard for the purposes and meaning of that constitutional provision.

The Judges argue that the right of public access to public records is not a right classified as fundamental in constitutional law. Therefore, the legislature is empowered, by the constitution itself, to fashion exceptions to the general right of public access to government records.

La. Const. art. XII, §3, states: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, *except in cases established by law.*" (Emphasis added.)

The text of La. Const. art. XII, §3, clearly authorizes the legislature to establish laws that provide exceptions to the right to observe the deliberations of public bodies and examine public documents. La. R.S. 44:4(47) provides such an exception.

Accordingly, this assignment of error lacks merit.

Constitutionality and Burden of Proof

In their third assignment of error, Plaintiffs argue that the trial court erred in failing to shift the burden of proof to Defendants as to the constitutionality of La. R.S. 44:4(47). In their fourth assignment of error, Plaintiffs argue that the trial court erred in dismissing their petition in light of the overlap of constitutional considerations under U.S. Const. Amend. I, V, VI and XIV and La. Const. art. I § § 2, 7, 16 and 19. In their fifth assignment of error,

Plaintiffs argue that the trial court erred in finding that they had failed to carry their burden of proof on the constitutionality of La. R.S. 44:4(47) and dismissing their claims.

The Judges argue that the burden of proof remained at all times on Plaintiffs, that it was Plaintiffs' burden to overcome the presumption of constitutionality and that La. R.S. 44:4(47) is constitutional.

Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the legislature in adopting a statute has acted within its constitutional powers. *Bd. of Directors of Louisiana Recovery Dist. v. All Taxpayers, Prop. Owners, & Citizens of State of La.*, 529 So. 2d 384 (La. 1988). Therefore, the party challenging the statute bears the burden of proving it is unconstitutional. *Krielow v. Louisiana Dep't of Agric. & Forestry*, 13-1106 (La. 10/15/13), 125 So. 3d 384; *In re SD.*, 52,238 (La. App. 2 Cir. 5/23/18), 250 So. 3d 1097. The burden of proof requires the attacking party to point out a specific constitutional provision that clearly prohibits the legislature from enacting the statute at issue. *Rhone v. Ward*, 39,701 (La. App. 2 Cir. 5/11/05), 902 So. 2d 1258, *writ granted, cause remanded*, 05-1651 (La. 1/13/06), 920 So. 2d 217, *citing Pope v. State*, 99-2559 (La. 6/29/01), 792 So. 2d 713.

In *Pesnell v. Sessions, supra*, this court stated that, on remand, it was incumbent upon Plaintiffs to prove to the trial court that La. R.S. 44:4(47) is

unconstitutional as applied to them. As the party challenging the constitutionality of La. R.S. 44:4(47), Plaintiffs bore the burden of proving its unconstitutionality, but they failed to overcome the presumption of constitutionality. As discussed above, the constitutional provision at issue, i.e., La. Const. art. XII, §3, clearly allows the legislature to enact the statute at issue, i.e., La. R.S. 44:4(47). Therefore, the trial court did not err when it did not shift the burden of proof to Defendants. Further, it did not err in determining that Plaintiffs failed to meet their burden of proof as to the alleged unconstitutionality of La. R.S. 44:4(47).

Although Plaintiffs argue on appeal that La. R.S. 44:4(47) should be declared unconstitutional on its face, this court declines to make such a declaration. The trial court sustained the exceptions of no cause of action based on Plaintiffs' failure to prove that La. R.S. 44:4(47) is unconstitutional. Any opinion from this court regarding the constitutionality of La. R.S. 44:4(47) would constitute an advisory opinion, and appellate courts will not render advisory opinions from which no practical results can follow. *See McChesney v. Penn*, 29,776 (La. App. 2 Cir. 8/20/97), 698 So. 2d 705.

Accordingly, these assignments of error lack merit.

The Court's Policy

In their sixth assignment of error, Plaintiffs

argue that the trial court erred when it ignored the court's policy and, in effect, upheld the policy. They note that if La. R.S. 44:4(47) is constitutional, then there is no need for the court's policy.

The Judges argue that as La. R.S. 44:4(47) is constitutional and excludes the information requested by Plaintiffs as not being a public record, Plaintiffs have no legal enforceable right to review, listen or obtain a copy of the recording. They contend that the court's policy is a reflection of the court's inherent authority over court records.

In *Pesnell v. Sessions, supra*, this court remanded this matter for a ruling on the constitutionality of La. R.S. 44:4(47). In its August 18, 2018 ruling and judgment, the trial court did not address the court's policy and, instead, sustained Defendants' exceptions of no cause of action to the extent that they were based on La. R.S. 44:4(47). Any opinion from this court regarding the issue of the court's policy would constitute an advisory opinion, and appellate courts will not render advisory opinions from which no practical results can follow. *See McCchesney v. Penn, supra.*

Accordingly, this assignment of error is not properly before this court for review.

CONCLUSION

For the foregoing reasons, we grant the motion to dismiss filed by Defendant-Appellee Jill Session,

and we affirm the trial court's judgment sustaining the exceptions of no cause of action filed by Defendants-Appellees Jennifer Bolden 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. Costs of this appeal are assessed to Plaintiffs-Appellants William Alan Pesnell and Christopher Holder.

**MOTION TO DISMISS GRANTED;
JUDGMENT OF TRIAL COURT AFFIRMED AS
TO BOLDEN AND THE JUDGES.**

APPENDIX B

WILLIAM ALAN PESNELL AND
CHRISTOPHER HOLDER

VERSUS

JILL SESSIONS, CLERK OF COURT, ET AL

NUMBER 151,118
26th JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

JUDGMENT

For the reasons set forth in written ruling of even date herewith, it is therefore:

ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants and against plaintiffs, sustaining the exceptions of no cause of action filed herein, to the extent they are based on La. R.S. 44:4(47).

Plaintiffs are cast with all costs of these proceedings.

JUDGMENT READ, RENDERED AND SIGNED THIS 18th day of August, 2018.

/s/
ERIC R. HARRINGTON
DISTRICT JUDGE AD HOC

Notice to all counsel of record

[DATE STAMP]
FILED
AUG 20 2018
/s/
DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

WILLIAM ALAN PESNELL AND
CHRISTOPHER HOLDER

VERSUS

JILL SESSIONS, CLERK OF COURT, ET AL

NUMBER 151,118
26th JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

[DATE STAMP]
FILED
AUG 20 2018
/s/

RULING

This matter is before the court on plaintiffs' petition to declare a provision of the Public Records Law unconstitutional and to compel production of an audio recording of a trial. This court sustained several exceptions and plaintiffs appealed. The Second Circuit Court of Appeal reversed some of the rulings, and remanded the case back to this court for a ruling on the constitutionality of La. R. S. 44:4(47), stating that "The petition states a cause of action upon which relief might be granted once the ruling on the constitutionality of the statute is rendered."

Factual Background

William Alan Pesnell is Christopher Holder's attorney in connection with succession proceedings for the estate of his mother, Donna Holder.

Mr. Holder was found guilty of the murder of his mother after a trial in the 26th Judicial District Court. Mr. Holder appealed his conviction, was unsuccessful, and that conviction is now final subject to any post-conviction relief that he may be eligible for. Mr. Holder and/or his father suggested that the trial transcript is inaccurate, and disagreed with the contents of it, particularly with regards to statements made by the District Attorney during his closing argument. Plaintiffs suggest that those statements they allege the District Attorney made ultimately caused or created prejudice in the mind of the jury. Plaintiffs further allege that the succession proceedings were impacted by the results of the criminal trial, in that Mr. Holder was prohibited from inheriting or collecting insurance proceeds from his mother's estate.

Mr. Pesnell, on behalf of himself and his client, made a request under the Louisiana Public Records Law (La. R.S. 44:1, et seq.) to the 26th Judicial District Court for the "data file" from Christopher Holder's criminal trial. Factually, Mr. Pesnell was requesting the unedited, uncensored audio recording of the trial. Mr. Pesnell also requested permission to review and copy the audio, and to have it tested by an expert to confirm that it had not been altered or manipulated. Mr. Pesnell's request was denied, pursuant to La. R.S. 44:4(47) and a local court rule regarding audio

recordings. Mr. Pesnell and Mr. Holder then filed the petition at issue herein.

Law and Analysis

The legislative power of the state is vested in the legislature. La. Const. Art. III, Section 1. In its exercise of the entire legislative power of the state, the legislature may enact any legislation that the state constitution does not prohibit. Thus, to hold legislation invalid under the constitution, it is necessary to rely on some particular constitutional provision that limits the power of the legislature to enact such a statute. (citation omitted). Laws enacted by the legislature are presumed to be constitutional and the constitutionality of statutes should be upheld whenever possible (citation omitted). Further, "It is not enough (for a person challenging a statute to) show that the constitutionality (of the statute) is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the legislature the power to enact the statute." (citation omitted). *Louisiana Public Facilities Authority v. Foster*, 2001-CA-0009, (La. 9/18/2001), 795 So.2d 288, 298.

The party challenging the validity

of a statute generally has the burden of proving unconstitutionality ... to satisfy this burden, the challenging party must cite the specific constitutional provision that prohibits the legislative action. *State v. Granger*, 07-2285 (La. 5/21/08), 982 So.2d 779.

The public's right to have access to the public records of governmental bodies is a fundamental right, and it is guaranteed by the state constitution in Article XII, Section 3: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law." In La. R.S. 44:1 the Louisiana legislature enacted the Public Records Law, broadly, granting the public the right to observe and examine public records and proceedings, with exceptions.

The constitutional right to examine public records must be construed liberally and unrestricted access to the records, and that access may be denied only when a law specifically and unequivocally provides otherwise. *Does v. Foti*, 11-0014, (a. App. 1st Cir. 12/08/11), 81 So.3d 101,107, writ denied, 2012-0057 (La. 3/2/12), 84 So.3d 537.

Any person of the age of majority may inspect, copy, reproduce, and/or obtain reproduction of any public record. (R.S. 44:32(A); R.S. 44:31(8)). A custodian of public records is prohibited from making inquiries of any person who applies for a public record, except an inquiry as to the age and identification of the

person. (R.S. 44:32(A)).

Pursuant to the specific authority in Article III, Section 1 of the Louisiana Constitution, "... except as provided by law.", the legislature has created hundreds of exceptions to the public records law in La. R.S. 44:4.1. In R.S. 44:4(47)(a), the legislature created other exceptions to the Public Records Law relating to courts and court records and proceedings. Subparagraph (a) states that the Public Records Law shall not apply:

(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 another type of electronic storage device, or to any shorthand or longhand notes or writings of stenotype paper tapes in the custody or under the control of a judge,

(b) 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, freelance 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.

Plaintiffs argue that the exception denies them certain rights that rise to the level of constitutional violations. However, the Public Records Law does not contemplate the relationship of the requester to the requested record, nor does the law distinguish between the individual making the request and the general public. In fact, the law specifically prohibits custodians from inquiring as to the requester's reason or intent for seeking public records.

Article 1, Section 5 of the Louisiana Constitution states "Every person shall be secure in his person, property, communications, houses, papers and effects against unreasonable searches, seizures, or invasions of privacy." This right to privacy applies only when one has a reasonable expectation of privacy in the matter sought to be protected. In order for the expected privacy to be reasonable and thus constitutionally protected, the expectation must not only be an actual or subjective expectation of privacy, but also of a type that society at large is prepared to recognize as being reasonable.

Court proceedings are open to the public. Therefore, it follows that there is no reasonable expectation of privacy in statements voluntarily uttered aloud in open court. On the other hand, statements intended to be private, which are inadvertently captured on sensitive court recording equipment, should be protected by the constitutional right to privacy.

Because of that, disclosure of the raw,

uncensored and unedited audio recording to Mr. Holder and his attorney would render the audio recording of the Holder murder trial a public record, subject to disclosure to any person requesting access to the record. Additionally, disclosure of the audio recording of those court proceedings would potentially make all audio records of all court proceedings subject to disclosure to any person requesting access to them. That would mean every comment picked up by a recording device, even whispered conversations between a defendant and his counsel, or sidebar conferences with the judge that were not intended to be recorded, would become a public record. That is almost certainly why the official record of a court proceeding is a certified transcript, and not an unedited, uncensored recording.

In their pre-hearing memorandum, plaintiffs cite *Labat v. Larose*, 2011-CA-0957 (1st Cir. 12/31/11), an unpublished opinion, in which the court of appeal allowed access to an audio recording of a court proceeding. Thereafter, in 2012, R.S. 44:4(47) was added to the Public Records Law.

One of plaintiffs' arguments is that R.S. 44:4(47) is overly broad in its exclusion, effectively denying plaintiffs their rights while protecting the privacy rights of others. In *St. Mary Anesthesia Associates, Inc. v. Hospital Service District, et al*, 2001 CA 2852, (La. 1st Cir. 12/20/2002), writ den. 3/28/2001, 836 So.2d 379, the court was faced with a case factually different from the one at hand, but nevertheless addressing challenges that certain statutes were overly broad and

therefore violative of Article XII, Section 3 of the Louisiana Constitution, which states that "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law." The Open Meetings Law did establish exceptions pursuant to the authority of the article, and they were being challenged as overly broad.

The court in *St. Mary Anesthesia* stated that:

Thus, the legislature is clearly empowered to fashion exceptions to the general right of public access. The central issue in this appeal, of course, is the permissible scope of such exceptions. (p. 387)

As correctly observed by one writer, "the plain language of Article XII, Section 3 of the state constitution empowers the legislature to exempt from disclosure any information it wishes." (citation omitted) Another commentator has even more forcefully asserted that "the subject is under legislative control, and the constitutional provision is merely a precatory admonition." (citation omitted). Regardless of whether the Act is viewed as creating a de facto exemption of hospital service districts or only broad exclusions in their favor, it is a permissible exercise of the legislative

power granted in Section 3's proviso.

...

For a statute to be found to be substantially overbroad is subject to facial invalidation. It is "strong medicine, to be applied sparingly and only as a last resort." (citation omitted). (p. 388)

The court went on to find the substantial overbreadth doctrine not applicable, and noted that whether the act at issue should have been drawn more narrowly was an issue "... which addresses itself to the sound discretion of the legislature as the people's elected representatives." (p. 389)

The court then held that:

... Stated more concisely, if a statute is broad enough to be applied both validly and invalidly, the valid interpretation should be used when it conforms to the legislative intent or purpose of the statute. (citation omitted)
p.389

...

Our review of the Act, in light of its avowed public purpose, convinces us that its terms are not so broad as to warrant the finding that they violate plaintiffs' rights both bestowed and limited by the Section.

Conclusions

Petitioners make argument regarding their alleged need for the records based on due process and other constitutional rights. However, a records custodian is prohibited from inquiring as to a person's reason for requesting public records under the Public Records law, which provides that the custodian "shall make no inquiry of any person who applies for a public record, except an inquiry as to the age and identification of the person ..." See La. R.S. 44:32(A). The judges here had no choice but to apply R.S. 44:4(47) to the request made by the petitioners herein, as it would be applied to any other member of the public.

Importantly, La. R.S. 4:44(47) validly serves to protect the constitutional privacy rights of all litigants, including plaintiffs.

The court does not find the exclusion section overly broad, but if so, it conforms to the intent and purpose of the statute, and is therefore valid.

Accordingly, plaintiffs have not met their heavy burden articulated in *Louisiana Public Facility Authority v. Foster*, *Id.*, and have failed to prove that La. R.S. 44:4(47) is unconstitutional as applied to them, and their petition fails to state a cause of action. The exceptions of no cause of action based on R.S. 44:4(47) are sustained. Plaintiffs are cast with all costs of these proceedings

THUS DONE AND SIGNED THIS 18th day of
August, 2018.

/s/
ERIC R. HARRINGTON
DISTRICT JUDGE AD HOC

Copies to all counsel of record

APPENDIX C

**STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700**

[DATE STAMP]
FILED
MAR 05 2018
/s/
DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

David G. Sanders
LOUISIANA DEPT. OF JUSTICE
P. O. Box 94005
Baton Rouge, LA 70804-9005

William Alan Pesnell
THE PESNELL LAW FIRM, APLC
P. O. Box 1794
Shreveport, LA 71166-1794

Emily G Andrews
Asst. Attorney General of LA
P. O. Box 94005
Baton Rouge, LA 70804-9005

Eric R. Harrington

Ad Hoc Judge - 26th JDC
P. O. Box 310
Benton, LA 71006

James Dell Southerland
SOUTHERLAND & SIMMONS
P. O. Box 338
Benton, LA 71006-0000

Patrick Richmond Jackson
PATRICK R. JACKSON, APLC
4442 Viking Drive, #100
Bossier City, LA 71111

Jill Sessions
Bossier Parish Clerk of Court
P. O. Box 430
Benton, LA 71006-0430

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

February 28, 2018

DOCKET Number: CA 17-51871

WILLIAM ALLEN PESNELL AND
CHRISTOPHER WAYNE HOLDER

VERSUS

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

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Clerk of Court

Judgment rendered February 28, 2018.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 51,871-CA

**COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA**

WILLIAM ALAN PESNELL Plaintiffs-Appellants
and CHRISTOPHER HOLDER

versus

JILL SESSIONS, CLERK OF Defendants-Appellees
COURT, ET AL.

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 151,118

Honorable Eric R. Harrington, Judge (*Ad Hoc*)

THE PESNELL LAW FIRM, A.P.L.C.
By: Billy R. Pesnell Counsel for Appellant,
 J. Whitney Pesnell Christopher Wayne
 W. Alan Pesnell Holder

WILLIAM ALAN PESNELL In Proper Person

JEFF LANDRY
Attorney General

Counsel for Appellees,
Judges of the 26th
Judicial District Court

**LOUISIANA DEPARTMENT
OF JUSTICE**
By: David G. Sanders
Assistant Attorney General

LOUISIANA DEPARTMENT Counsel for Appellee,
OF JUSTICE The State of Louisiana
By: Emily G. Andrews
Assistant Attorney General

PATRICK R. JACKSON
Bossier Parish Attorney

Counsel for Appellee
Jennifer Bolden,
Certified Digital
Reporter

JAMES D. SOUTHERLAND Counsel for
Jill Sessions,
Clerk of Court, 26th
Judicial District Court

* * * * *

Before BROWN, PITMAN, and STEPHENS, JJ.

PITMAN, J.

In this suit brought under the Public Records Law, Plaintiffs William Alan Pesnell ("Pesnell") and Christopher Holder ("Christopher") appeal the ruling

of the trial court which sustained exceptions of no cause of action filed by Jill Sessions, Clerk of Court of the 26th Judicial District Court; Jennifer Bolden, Court Reporter; and Judges Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self (collectively, "the Judges"), finding they were not custodians of records sought in this case. Plaintiffs also appeal the ruling of the trial court which sustained exceptions of no cause of action and lack of subject matter jurisdiction filed by the State of Louisiana through the Office of the Attorney General in response to their challenge to the constitutionality of the Public Records Law. For the following reasons, the judgment of the trial court is affirmed in part, reversed in part and remanded.

FACTS

Christopher was found guilty of the second degree murder of his mother, Donna Green Holder. After the verdict was rendered, his uncle (Donna Holder's brother) opened the intestate succession of his sister, the victim, and asked that Christopher be declared unworthy and excluded from any inheritance, life insurance benefits or any other benefits to which he would have been entitled had he not caused his mother's death. The Pesnell Law Firm represented Christopher in the succession proceedings; Christopher was found unworthy to inherit.

Both the criminal verdict and the civil judgment were appealed to this court and were affirmed. *See State v. Holder*, 50,171 (La. App. 2 Cir. 12/9/15), 181

So. 3d 918, *writ denied*, 16-0092 (La. 12/16/16), 211 So. 3d 1166, and 16-0056 (La. 12/16/16), 212 So. 3d 1176; and *Succession of Holder*, 50,824 (La. App. 2 Cir. 8/10/16) 200 So. 3d 878, *writ denied*, 16-1694, (La. 12/16/16), 212 So. 3d 1169. These judgments are now final.

Pesnell was hired by Christopher's father, Gary Holder, to review the criminal record on Christopher's behalf, allegedly to aid him in his defense in both the criminal and civil appeals. Pesnell claims that while the cases were pending on appeal, "it came to the attention of undersigned counsel that certain persons who were present at that trial (the criminal trial) ... believed that the transcript of that trial, which was presented to this Court, was not correct." Specifically, he has an affidavit from Gary Holder (the "Holder affidavit"), which states that due to his son's debilitating mental illness, he has attempted to aid his son's defense. Gary Holder claimed to have been present for each phase of the trial from beginning to end. In his affidavit, he avers that during the closing arguments of his son's murder trial, he was present in open court and heard the district attorney making incendiary remarks to the jury about Christopher's mental state, the fact that Christopher may be released in the future if found not guilty by reason of insanity and that Christopher's father would take whatever steps to get Christopher released early by pulling strings with officials and/or physicians in order to have him released from any facility to which he may be sent for psychiatric treatment or observation. Gary Holder also stated in the affidavit that Rick Fayard,

Christopher's attorney in the criminal matter, vehemently objected and described the remarks as the most unethical move that he had seen in all his years of practicing law. The Holder affidavit states that he thought this colloquy and objection to be very important in the matter and ordered a transcript of the proceedings. He also stated that when he received that transcript, he was shocked to find that the objection was not in the transcript and, further, that the language used by the district attorney had been changed from what he had heard in the courtroom.

The Holder affidavit also stated that, in his capacity as Christopher's curator, and pursuant to having his power of attorney, Gary Holder hired Pesnell to file a civil appeal in the succession proceeding of Christopher's mother and to help obtain information and facts concerning matters related to post-conviction relief efforts. In an effort to investigate Gary Holder's claims concerning the absence from the transcript of the language used by the district attorney, Pesnell began trying to acquire the recording of the criminal trial so that he could compare the transcript with the recording.

Pesnell attempted to get the recordings from the trial court by various methods, including a letter to Sessions, Clerk of Court of the 26th Judicial District Court, requesting a copy of the data file in the criminal case. Sessions responded, designating the court reporter, Jennifer Bolden, as the custodian of the record. Pesnell then sent a letter to Bolden requesting the data file. That letter was apparently referred to

the 26th Judicial District Court Judges' office, and he received a response from Melissa Fox, Court Administrator and Senior Staff Attorney, stating that La. R.S. 44:4(47) excluded the record from being public. Ms. Fox also referred Pesnell to a local court policy, which stated that no one was allowed to listen to courtroom recordings since, at times, an attorney speaking to his client might be picked up by the microphone. The policy exists so that attorney-client privilege is protected. The policy stated that exceptions could be made at the discretion of the trial court. However, in this case, Pesnell's request for the alleged public record was denied.

Pesnell sent a letter to Chief Judge of the 26th Judicial District Court Parker O. Self and to Judge Michael Nerren (trial judge who presided over the criminal action) requesting access under the local policy. Ms. Fox responded again, denying his request and informing him that any problem with the record should be submitted to the court of appeal.

Because they had been unsuccessful in their attempt to acquire the recording from which the transcript was made, on September 22, 2016, while the criminal matter was pending appeal to the Louisiana Supreme Court, Plaintiffs filed a petition against Defendants under the Public Records Law, La. R.S. 44:1, *et seq.*, seeking recordings "for inspection and testing" from the criminal trial at which Christopher had been found guilty. They subsequently amended their petition and added the State of Louisiana as a defendant and sought a declaration that a provision of

the Public Records Law was unconstitutional in substance and as applied.

The Judges filed an exception of no cause of action seeking a declaration that the recordings were not subject to the Public Records Law and cited La. R.S. 44:4(47), the constitutionality of which was eventually challenged by Plaintiffs. Sessions filed an exception of no cause of action, alleging that under the Public Records Law, the clerk of court is not the custodian of the records sought. Bolden also filed an exception of no cause of action, alleging that she is not the custodian of the records sought and raised other claims set forth in the Judges' exception.

The state filed an exception of lack of subject matter jurisdiction and no cause of action, claiming that it was not the custodian of the document sought and that it was improper for it to be named by itself on a claim that a statute was unconstitutional.

The trial court bifurcated the issues pertaining to Sessions, Bolden and the Judges on the exceptions of no cause of action from those of the claims brought against the state and ordered briefing on the issue of the proper defendant in a claim that the statute was unconstitutional. It found that Sessions and Bolden were not custodians of the records sought, but that the Judges were and that Plaintiffs had no cause of action against them as custodians since the records sought were excluded from coverage under the Public Records Law pursuant to La. R.S. 44:4(47). It sustained the exceptions of no cause of action filed by Sessions,

Bolden and the Judges, and Plaintiffs' case was dismissed as to them. However, the judgment reserved for a later date Plaintiffs' claims that La. R.S. 44:4(47) and the local rule of the 26th Judicial District Court are unconstitutional on their face or as applied and ordered the Judges, the state and Plaintiffs to brief the issue of the identity of the proper defendant in the lawsuit.

Plaintiffs filed a motion for new trial, which was set for hearing on the same date as the state's exceptions. In March 2017, the trial court reconvened and denied the motion for new trial. It also heard the state's exceptions of lack of subject matter jurisdiction and no cause of action. The state's brief asserted that the dismissal of the public records claim mooted the constitutional issue and that it had no obligation to Plaintiffs with regard to the production of the recording. The Judges adopted that argument, and the trial court sustained the state's objections of no cause of action and lack of subject matter jurisdiction.

Plaintiffs have filed this appeal seeking review of the trial court's sustaining the exceptions of no cause of action of all parties and the exception of lack of subject matter jurisdiction filed by the state and the dismissal of their case.

DISCUSSION

Plaintiffs argue that the trial court erred in bifurcating the issues and in sustaining the exceptions of no cause of action without ruling on the

constitutionality of the statute before using that statute as a basis for sustaining the exceptions.

Plaintiffs argue it was error for the trial court to have sustained the exceptions of no cause of action and to bifurcate the constitutionality of the statute issue since, in doing so, it "left a naked constitutional claim unsupported by the underlying dispute." They further argue that the trial court dismissed the very part of the pleading that disclosed the controversy between the parties. They claim that Christopher is in the post-conviction relief period on a murder conviction and is entitled to due process, and that post-conviction relief is available to defendants if the conviction was obtained in violation of the Constitutions of the United States or the State of Louisiana.

Plaintiffs also argue that the trial court erred in sustaining the exception of no cause of action filed by Bolden since she is statutorily required to retain, indefinitely, all notes and tape recordings of a criminal case. They assert that if the record of the trial is fully transcribed, the court reporter must retain all notes and tape recordings which have been fully transcribed for a period of not less than two years after transcription is completed. La. R.S. 15:511(A). They contend that pursuant to this statute, Bolden became the "custodian" of the records as defined in the Public Records Law.

Sessions claims that the trial court correctly sustained the exception of no cause of action since La. R.S. 44:35 requires that the person seeking the right

to inspect or reproduce an item must have been denied that right by the custodian of the data requested. She argues that Plaintiffs were clearly informed that she did not have custody or control of the information and that the court reporter is required to retain and maintain all notes and tape recordings, although the recordings shall remain the property of the court. For these reasons, she asserts that the trial court properly sustained the exception of no cause of action since the antecedent condition, i.e., that the record is held at the office of the official from whom the records are requested, cannot be met.

Bolden cites La. R.S. 15:511(B) and argues that it specifically states that the recordings shall be the property of the court in which the case was heard. She claims that under the statute, she had the duty only to retain and maintain such recordings, but was not the custodian. She also argues that she did not have the requested information in her possession and had no control over it. For these reasons, she claims the trial court correctly sustained the exception of no cause of action.

The Judges argue that Plaintiffs made a request for the recording from Bolden and that the judicial administrator of the 26th Judicial District Court declined the request since the records sought were not public records under the Public Records Law. La. R.S. 44:4(47). The judicial administrator referred Plaintiffs to the court's policy regarding audio recordings of court proceedings, which generally prohibit listening to any recording of any court proceeding, except under

extraordinary circumstances and with court permission. The Judges assert that they are not the "custodian" of the records as defined in the law, which states the custodian is the public official or head of any public body having custody or control of public records, or a representative specifically authorized by him to respond to requests to inspect any such public record. They argue that while district court judges are public officials, they are not the head of any public body.

The Judges further argue that because the Public Records Law does not apply to the recording requested, Plaintiffs have no right to it. Access could be granted only under the local court rule, which requires permission from the court. Plaintiffs sought permission from the trial court to listen to the recordings, but it denied their request and further advised that any correction of the record should be pursued at the appellate court level under La. C.C.P. art. 2132, which states that a record on appeal which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected even after the record is transmitted to the appellate court, by the parties by stipulation, by the trial court or by the order of the appellate court. All other questions as to the content and form of the record are to be presented to the appellate court. In this case, the criminal case was pending in the appellate court at the time the requests for the recording was made. The Judges also claim that Plaintiffs should have sought relief from the appellate court. Therefore, they argue, the trial court correctly sustained the exception of no cause of action.

With regard to Plaintiffs' constitutional challenge of the designation of the recording under the Public Records Law as an exception to the law, the Judges argue that the constitutional challenge should not have been brought as a declaratory judgment claim in a separate lawsuit, but should have been brought up in the underlying criminal case. They assert that the sustaining of the exceptions of no cause of action rendered any further proceedings in this matter moot.

After the trial court sustained the exceptions of no cause of action of Sessions, Bolden and the Judges, it addressed the state's brief in support of the exceptions of no cause of action and lack of subject matter jurisdiction. The state's brief argued that once the trial court found Plaintiffs had no right to the recording requested under the public records action, the constitutional issue became moot and ceased to be a justiciable controversy in which to decide the constitutionality of the statute. It contended that when a case is moot, there is no subject matter on which the judgment can operate.

The state further argues that it was not a proper defendant in the case since Plaintiffs' petition makes no factual allegations against it, and it is not proper to make it a defendant solely on the basis that the constitutionality of a statute is being challenged. A constitutional challenge may be made by a party in a case where there is an adverse party and the existence of a controversy as envisioned by the Louisiana Supreme Court's definition of "justiciable controversy." There is no need to join a special party or

defendant when one challenges the constitutionality of a statute. Absent an adverse party, there is no cause of action to simply challenge the constitutionality of a statute because a litigant believes the statute's constitutionality is doubtful. It contends that the proper party to sue under the Public Records Law is the custodian of the record, and it is not such a custodian in this case.

Public Records Law

La. R.S. 44:1 contains the definitions found in the Public Records Law and states in pertinent part as follows:

A(1) As used in this Chapter, the phrase "public body" means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function, or an affiliate of a housing authority.

(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.**

...

(3) As used in this Chapter, the word "custodian" means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records.

(Emphasis added.)

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

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, freelance 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.

Exceptions of No Cause of Action

The peremptory exception of no cause of action tests the legal sufficiency of the petition by

determining whether the law affords a remedy on the facts alleged in the petition. *Gipson v. Fortune*, 45,021 (La. App. 2 Cir. 1/27/10), 30 So. 3d 1076, *writ denied*, 10-0432 (La. 4/30/10), 34 So. 298. The exception is triable on the face of the petition; and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Fink v. Bryant*, 01-0987 (La. 11/28/01), 801 So. 2d 346; *Johnson v. City of Coushatta*, 46,914 (La. App. 2 Cir. 1/25/12), 86 So. 3d 32. Louisiana recognizes a right to receive copies of public documents and records. La. Const. art. XII, § 3, provides, "No person shall be denied the right to ... examine public documents, except in cases established by law." *Johnson, supra*.

Custodian of the record

La. C.C.P. art. 251(A) states that the clerk of court is the legal custodian of all of its records and is responsible for their safekeeping and preservation. He may issue a copy of any of these records, certified by him under the seal of the court to be a correct copy of the original.

La. R.S. 15:511 concerns court reporters and the retention of notes and recordings in criminal cases and states in pertinent part as follows:

A. The court reporter shall retain indefinitely all notes and tape recordings of a criminal case. However, if the record of the trial or other criminal proceeding is fully transcribed, the court reporter

shall retain all notes and tape recordings which have been fully transcribed for a period of not less than two years after transcription is completed [.]

B. The notes and tape recordings of any criminal case which are retained by a court reporter pursuant to the provisions of this Section shall be the property of the court in which the case was heard. The court reporter shall have the duty to retain and maintain all such notes and tape recordings pursuant to the provisions of this Section, although the notes and tape recordings shall remain the property of the court.

There is only one reported case interpreting La. R.S. 15:511, but it is not instructive on the issue of who might be the custodian of the recording of a criminal trial. In *Marler v. 22nd Judicial Dist. Ct., Parish of Washington*, 93-2394 (La. App. 1 Cir. 11/10/94), 645 So. 2d 821, a defendant sought the tape recordings of his criminal trial for purposes of post-conviction relief and alleged that although he had been provided with a copy of the transcript of his trial, the tape recordings were crucial to his PCR, and the right to the tapes was protected by the Constitutions of the United States and the State of Louisiana. Although the 22nd Judicial District Court is named as a defendant in the suit, the Washington Parish DA appears as the defendant in the list of parties in the appellate opinion. In *Marler*, the appellate court

determined that the defendant pursuing post-conviction relief was not entitled to a tape recording of his trial. He had been given a full transcript of his trial, and the period during which the court reporter was required to retain tape recording had expired.

Applying the rules pertaining to exceptions of no cause of action, this court must accept the well-pleaded facts of Plaintiffs' petition as true. Although it is unclear who is the custodian of the recordings sought, we find that Plaintiffs have stated a cause of action against the Clerk of Court, who is the legal custodian of the public records under La. C.C.P. art. 251; the court reporter, who has the duty to maintain the record under La. R.S. 15:511; and the court which owns the records pursuant to La. R.S. 15:511(B). Since the policy of the 26th Judicial District Court gives control over access to the recording sought to the Judges, we find the Plaintiffs have also stated a cause of action as to them. For the foregoing reasons, the assignments of error related to the trial court's sustaining of the exceptions of no cause of action of the Clerk of Court, the court reporter and the Judges, have merit and are hereby reversed.

Since the State of Louisiana is not the custodian of the public record sought by the Plaintiffs, we find the trial court correctly sustained the exception of no cause of action it filed. Further, the fact that Plaintiffs alleged that La. R.S. 44:4(47) is unconstitutional does not create any duty for the "State of Louisiana" to come forward and defend the validity of the statute.

There must be a justiciable controversy for the state to be involved as a defendant; and when that is present in a lawsuit, the Attorney General of the State of Louisiana is given notice and is allowed to present a defense of the statute at its discretion. For the foregoing reasons, the judgment of the trial court sustaining the state's exception of no cause of action is affirmed.

Constitutionality of the Statute

Legislation is deemed a solemn expression of legislative will. La. C.C. art. 2. Statutes are presumed to be constitutional and their constitutionality will be preserved "when it is reasonable to do so." *State v. Granger*, 07-2285 (La. 5/21/08), 982 So. 2d 779, quoting *State v. Fleury*, 01-0871 (La. 10/16/01), 799 So. 2d 468. Since statutes are presumed to be constitutional, "the party challenging the validity of a statute generally has the burden of proving unconstitutionality." *State v. Granger*, *supra*, quoting *Moore v. RLCC Techs., Inc.*, 95-2621 (La. 2/28/96), 668 So. 2d 1135. To satisfy this burden, the challenging party must cite the specific constitutional provision that prohibits the legislative action. *State v. Granger*, *supra*; *State v. Fleury*, *supra*; *Rhone v. Ward*, 45,008 (La. App. 2 Cir. 2/3/10), 31 So. 3d 591, *writ denied*, 10-0474 (La. 4/30/10), 34 So. 3d 291.

In the case at bar, we have found that Plaintiffs' petition stated a cause of action upon which some relief might be granted. Such relief is predicated upon a trial court's threshold decision concerning the

constitutionality of the statute invoked by Plaintiffs for production of the recordings sought. It is now incumbent upon Plaintiffs to prove to the trial court that La. R.S. 44:4(47) is unconstitutional as it is applied to them and that they are entitled to the recording sought. For these reasons, the matter is remanded for a ruling on the constitutionality of the statute and for further relief if necessary.

CONCLUSION

The judgment of the trial court sustaining the exception of no cause of action filed by the State of Louisiana is affirmed. The judgment of the trial court sustaining the exceptions of no cause of action filed by Defendants 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; is reversed. The petition states a cause of action upon which relief might be granted once the ruling on the constitutionality of the statute is rendered. The matter is remanded for further proceedings. Costs shall be assessed by the trial court at the issuance of a final judgment.

**AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.**

NOTICE OF JUDGMENT

**TWENTY-SIXTH JUDICIAL DISTRICT
PARISH OF BOSSIER
STATE OF LOUISIANA**

WILLIAM ALAN PESNELL ET AL

VS

JILL SESSIONS CLERK OF COURT ET AL.

DOCKET NUMBER: C-151118

**TO: WILLIAM ALAN PESNELL
INDIVIDUALLY AND AS ATTORNEY OF
RECORD FOR:
CHRISTOPHER HOLDER
H.C. BECK BLDG.
400 TRAVIS STREET, SUITE 1100
SHREVEPORT, LA
71101**

YOU ARE HEREBY NOTIFIED that on 13th day of December, 2016 a JUDGMENT was filed in the above numbered and entitled matter. A certified copy of said JUDGMENT is hereby annexed and made a part hereof.

WITNESS MY OFFICIAL HAND AND SEAL
OF OFFICE at Benton, Bossier Parish, Louisiana on
DECEMBER 13, 2016.

JILL M. SESSIONS, CLERK OF COURT

/s/

Deputy Clerk
26th Judicial District Court
Bossier Parish, Louisiana

I HEREBY CERTIFY that a copy of the above and
foregoing notice and attached

JUDGMENT

has been forwarded to all counsel of record, or party if
not represented by counsel, by depositing same in the
United States Mail with sufficient postage attached,
on DECEMBER 13, 2016.

JILL M. SESSIONS, CLERK OF COURT

/s/

Deputy Clerk
26th Judicial District Court
Bossier Parish, Louisiana

APPENDIX D

NO. 151118

26TH JUDICIAL DISTRICT COURT BOSSIER PARISH, LOUISIANA

[DATE STAMP]
FILED
DEC 13 2016
SARA E. HALPHEN
DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

WILLIAM ALAN PESNELL AND
CHRISTOPHER HOLDER

VERSUS

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

JUDGMENT

This exception of no cause of action came to be heard this day. Present, James D. Southerland, Attorney for Jill M. Sessions, Clerk of Court of bossier Parish, Louisiana and William Alan Pesnell, Attorney representing himself and Christopher Holder. When after considering the allegations contained in Plaintiffs' petition, its exhibits, the exception filed on behalf of the Clerk of Court, and its attached memorandum, and the arguments of counsel:

IT IS ORDERED, ADJUDGED AND DECREED that the exception of no cause of action filed on behalf of the Clerk of Court in this matter be maintained and that Plaintiffs' proceedings against Jill M. Sessions, Clerk of Court for Bossier Parish, Louisiana, be dismissed at Plaintiffs' costs.

Benton, Louisiana, this 13th day of December 2016.

/s/
JUDGE AD HOC
Eric R. Harrington

APPROVED:

/s/
James D. Southerland

/s/
William Alan Pesnell

[STAMP]

A TRUE COPY-ATTEST

/s/

DEPUTY CLERK

26TH JUDICIAL DISTRICT COURT

BOSSIER PARISH, LOUISIANA

APPENDIX E

**WILLIAM ALAN PESNELL AND
CHRISTOPHER HOLDER**

vs.

**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**

No.2019-C-01040

IN RE: Christopher Holder - Applicant Plaintiff;
William Alan Pesnell - Applicant Plaintiff; Applying
For Writ Of Certiorari, Parish of Bossier, 26th Judicial
District Court Number(s) 151,118, Court of Appeal,
Second Circuit, Number(s) 52,646-CA;

October 15, 2019

Writ application denied.

BJJ
JLW
SJC
JTG
SMC

Hughes, J., would grant.

Supreme Court of Louisiana
October 15, 2019

/s/
Second Deputy Clerk of Court
For the Court