No. 19-874

IN THE

Supreme Court of the United States

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.

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

REPLY TO THE OPPOSITION FILED BY JENNIFER BOLDEN TO THE PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF AND ARGUMENT

William Alan Pesnell and Gary Holder, as curator of Christopher Holder, hereby reply to the brief in opposition filed by Jennifer Bolden ("Respondent"). The opposition begs many questions, but answers none. The position of Respondent begs the distraction of the Court from the issues at bar. The opposition is an invitation to follow Alice down the rabbit hole.[1] Down that hole, the opposition is re-stated by the "March Hare" - "I have an excellent idea, let's change the subject." *Id.*

(1). The issues in the Introduction of Respondent's Opposition.

Respondent declares in her introduction that Petitioners are "*...not just members of the general public - they are the convicted criminal defendant, and counsel for the defendant in an ancillary proceeding."* Respondent further declares that "*...Petitioners have not shown that their status as defendant and counsel*[2] *do not provide them with*

[1] Carroll, Lewis, *Alice's Adventures in Wonderland*, (1865).

[2] Respondent refers to the status of Christopher Holder as a defendant in a separate criminal case, **not** this separate and distinct proceeding. Respondent refers to Pesnell as counsel in a separate civil case, **not** in connection with this proceeding. Yet, the criminal conviction is final and there is no case. Further, Pesnell was counsel of record in a civil proceeding ***on appeal*** and was counsel only after all of the record there was closed. Thus, even if that were pertinent to this proceeding, which it is not, it does not address any issues that are pertinent to this Court.

tools capable of confirming or disconfirming the accuracy of the trial transcript. Accordingly, no court need now decide the constitutional question." Brief of Respondent at pp. 2-3. Respondent asserts that "*...Petitioners' failure to show that they could not otherwise confirm or disconfirm the accuracy of the transcript also means that they have not shown that they sustained any harm."* Brief of Respondent at p. 3.

Nowhere in Respondent's entire brief does she provide any authority for the proposition that Petitioners somehow waived or relinquished the constitutional rights at issue by becoming a member of the bar of the State of Louisiana, or a defendant in a criminal proceeding. Even prisoners have First Amendment rights. See *Shaw v. Murphy*, 532 U.S. 223 (2001); *Turner v. Safley*, 482 U.S. 78 (1987).[3] Petitioner Pesnell did not waive or release any constitutional rights be becoming a member of the bar of the State of Louisiana.

Respondent claims that there is no harm because there was some other procedure which would have allowed access the digital data file of the murder trial. Respondent is factually and legally incorrect. Respondent has not shown any procedure that would allow Petitioners to obtain a copy of the digital data file except through the constitutional

[3] This Court should note also, in its decisions cited here, the differing standards *applied to the government* in enacting rules and regulations that directly impact First amendment rights. Even with prisoners, this Court has mandated a rational relationship test, or a compelling interest test to the enactment and enforcement of regulations directly impacting a prisoner's rights under the First Amendment.

access rights under the First, Sixth and Fourteenth amendments of the United States Constitution.

The harm arising from a statute impacting a constitutional right is the violation of that right itself, and even the potential violation of that right. See for example, *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999); *Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Third party standing has been invoked to vindicate constitutional rights. The Louisiana statute at issue removes from public purview the digital data files of public judicial proceedings. The breadth of the statute is sweeping and provides for no exceptions. The Louisiana courts found that no exceptions could exist. Accordingly, public access to that important judicial document has been barred. Direct requests were made under the Louisiana public records statutes, those requests were denied in reliance on the statute at issue. That is direct damage. Petitioner Holder can potentially use the information to impact post-conviction relief efforts in state court, or habeas corpus relief in federal courts. Petitioner Pesnell can use the information for public comment, lobbying to effect change, and for direct petition to the courts of the state of Louisiana.[4] The position of Respondent is without merit.

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[4] If it be shown that the transcript is inaccurate, or that the data file was somehow manipulated, then that has a direct relationship to the ability in the case at bar to file a petition for nullity under La. C.C.P. Art. 2004 et seq. due to a fraud or ill practice. It has direct consequences to Holder's conviction as well.

(2). Whether the Court should take up the issues posed by Petitioners' first question.

Respondent asserts that there was a waiver of constitutional rights by Petitioner Pesnell for becoming a member of the bar of the State of Louisiana, and a claim of a waiver by Petitioner Holder because he is a convicted criminal defendant. The arguments above are incorporated herein by reference. Neither Petitioner has waived or otherwise given up any constitutional rights at issue by becoming a member of the Louisiana Bar or by being convicted.

The public records statutes of all states, and the Freedom of Information Act on a federal level, provide a place where a person can get information useful to the exercise of a person's constitutional rights. Documents so acquired are routinely used to disseminate information to the public, to lobby legislators, and to petition the government. The state of Louisiana afforded convicted persons the right to obtain information useful to their post-conviction relief procedures through its public records statutes. See La. R.S. 44:31.1. Petitioner Pesnell is certainly not impacted by any such claim.

i. That Holder's desire for post-conviction relief purportedly does not permit this Court to reach a constitutional question.

Respondent asserts that Petitioner Holder's rights to post-conviction relief somehow bars or otherwise impairs this Court's ability to reach the constitutional questions in this matter. In support,

Respondent simply refers to the general discovery rules of the Louisiana Code of Criminal Procedure. Such discovery is limited to certain matters between the district attorney and the defendant. See La. C.Cr.P. Art. 716 et seq. Nothing in those articles addresses an internal court document not yet created. Similarly, La. C.Cr.P. Art. 930 is unavailing. That article requires a court to order a hearing when there is an unresolved question of fact. In post-conviction relief, Holder is required to state "...the grounds upon which relief is sought...specifying with reasonable particularity the factual basis for such relief..." (Art. 926(B)(3)), and "...All errors known or discoverable by the exercise of due diligence..." (Art. 926(B)(5). Holder cannot obtain that information without access to the data file. Specifically, Art. 930 states that the following matters are to be considered:

> "B. Duly authenticated records, ***transcripts***, documents, or portions thereof, or admissions of fact may be received in evidence." Emphasis added.

Nothing there indicates the data file recording can or will be used or that a defendant can compel the judge of the trial court to produce that tape. **The existence of the local rule shows that the data file tape cannot be compelled. The rule sets forth an anticipatory denial to any such request, requiring a defendant to go through the trial court judge, whose decision is unfettered and without any review whatsoever.** The decision under the local rule is

made at the whim or fancy of the judges, leading to an arbitrary and capricious decision. The statute at issue, La. R.S. 44:4(47) simply refuses that document to any person, on its face.

Respondent suggests that someone could obtain consent to listen to the recording in camera, or through a special master. The record clearly discloses that a request was so made and arbitrarily and capriciously refused by Judge Nerren. That relief alone does not validate the data file recording. The claims made regarding a special master are outside of the record. The trial court judge could have ordered that without regard to the position of the parties. He did not. Respondent is arguing matters outside the judicial record which are therefore outside of the scope of review. And she is misstating them to boot.

ii. That Pesnell's desire for Christopher Holder to inherit does not permit this Court to reach a constitutional question.

Respondent's opposition refers to several articles of the Louisiana Code of Civil Procedure. La. C.C.P. Art. 2824 controls the scope of admissible evidence in contradicted probate proceedings. It does not give any path to the compulsion of production of the data file tape at issue. Likewise, La. C.C.P. Art. 1461, 1462, and 1463 have no application here. Arts. 1461 and 1462 ***only control the production of evidence between the parties to a proceeding.*** Art. 1463 allows for an "...independent action..." against a *third person* in control of documents. The presiding court is not a "third person." Respondent begs the question of

whether a court subpoena itself? The discretion of the court, together with the notion that a court cannot sanction itself with any authority, militates against a finding that a court may subpoena itself. The existence of the local rule,[5] affirmatively show that the civil procedure articles cited by Respondent have no application to the issues before this Court.

This case stands on its own merits. The questions before this Court concern the ability of the Louisiana legislature to close a judicial proceeding and keep secret a data file tape of a public murder trial from public review. None of the arguments in Respondent's opposition are before this Court and never have been. The arguments are red herrings. They should be disregarded.

iii. That Petitioners' status as members of the public does not permit the Court to reach a constitutional issue.[6]

Respondent argues that the fact that Petitioners are members of the public makes for no greater standing. The argument makes meaningless distinctions. The argument does nothing, if not seek to diminish and avoid the fundamental rights reserved to citizens in our Constitution.

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[5] If the court could or would subpoena itself, and if a court had any authority to sanction itself, then such a rule is completely unnecessary.

[6] Notably, Respondent does not suggest how any such procedural rights are to be exercised where there is no pending case or cause.

The statute at issue affects the right of access to judicial documents created by the Louisiana courts, as a function of the Louisiana courts, and which are utilized by the Louisiana courts in the exercise of trial court and appellate judicial functions. The trial data file at issue records the proceedings of a public murder trial. The murder trial itself is significant for public comment. The issues concerning access to the tape, and what may have happened to the tape or the transcript are significant issues bearing on the transparency of the judiciary, which likewise necessarily bears on due process. The First, Sixth and Fourteenth Amendments protect the public's right to access to the data file, especially after transcription.[7]

iv. That Petitioners do not show that they have been harmed.

Respondent again asserts that the discovery tools provided in civil and criminal discovery sufficiently protect Petitioners. The arguments set forth above are incorporated herein by reference. Respondent never explains - nor can she - why Petitioners must forego an equally available method of obtaining documents and information.

[7] Petitioners specifically requested a limiting holding by the Louisiana courts which could have curtailed the constitutional claims if not obviated them completely. Yet, the Louisiana courts determined that no such limited reading could be applied to the statute at issue.

(3). That this Court should not take up the issues posed by Petitioners' second question.

Petitioner Holder is not here seeking direct or collateral review of his criminal conviction. Petitioner Holder is here in a civil matter over production of documents created and maintained by the Louisiana judiciary. This an action seeking to obtain documents in order to do due diligence and make whatever claims he is required to make in exhaustion of his state remedies. Holder must be able to do so in order to preserve his remedies in federal court as well. The arguments and points set forth above are incorporated herein by reference.

i. See the arguments above. Ordinary criminal procedures do not suffice and are not applicable.

(4). That no issue is posed by the first part of Petitioner's third question.

The notion that Petitioners do not argue that a fundamental right has been impaired is specious. First, Sixth and Fourteenth amendment rights are fundamental rights. Limiting the definition of fundamental rights to marital and family issues as Respondent attempts to do simply discards the body of federal jurisprudence otherwise. Even the Louisiana courts characterize the rights of access as fundamental rights. See *Landis v. Moreau*, 2000-1157 (La. 2/2/01), 779 So.2d 691; *Title Research Corp. v. Rausch*, 450 So.2d 933 (La. 1984). Further, the Louisiana courts have already recognized that

First Amendment and Fourteenth Amendment rights exist under the state constitutions. *State v. Widenhouse*, 21,605-KW (La. App. 2 Cir. 1/22/90), 556 So.2d 187, 189-190. One of the tests set forth by this Court for a determination of access clearly follows the line of cases concerning the need for a compelling state interest in passing laws that impinge on fundamental rights. See *Press-Enterprise, Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 13-14 (1986). Here we are discussing a *state statute* closing access to the document at issue. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) and related cases are directly at issue.

Respondent's opposition does bring to light a certain issue to be made clear. The petition and exhibits do make a *prima facie* case, Yet, it does not stop there. The petition and exhibits, independent copies of the letters of request, rejection, re-application and refusal were directly introduced into evidence, as were the affidavits supporting the Petitioners' claims. The defendants did not refute, rebut, or otherwise assail that evidence. The Defendants did not place any evidence directly on those points. Therefore, it was not just a *prima facie* case made - it was a complete case on un-refuted evidence which clearly established the dispute, the damage, and therefore the standing of Petitioners. At that point, it was incumbent on the State or the Defendants to show a compelling state interest to support the statute, ***and*** to show that the statute was narrowly tailored to accomplish that interest. They did not. The narrowing construction offered by Petitioners to the Louisiana courts was rejected. Therefore, the statute is not narrowly tailored to

achieve any purported purpose. Rather, the statute is sweeping in its exclusion and admits of no exceptions. The same is true of the local rule.

(5). That the Second Circuit Court of Appeal correctly decided the issue posed by the second part of Petitioners' third question.

Respondent asserts that the Second Circuit correctly decided the issues before this Court. That is premised on the notion that the Second Circuit found that Petitioners had not proven their case. Yet, the Second Circuit so states based on the improper application of the burdens on the state regarding statutes affecting fundamental liberties. The direct evidence shows that a valid request was made by Pesnell for himself, individually, and for Holder in a representative capacity. The custodians of the record denied the request based on the very statute at issue before this Court, and no production was made. Petitioner Pesnell's status as a person entitled to receive the information is clearly adduced in the direct evidence, including but not limited to his bar standing, and Petitioner Holder's status was affirmatively adduced as well. The denial of access and the reasons therefore were likewise substantiated by the direct evidence. No defendant placed any evidence otherwise in the record.

Once that information was entered into the record, it became incumbent on a defendant to show a compelling state interest, or some other lesser standard if it could be proven to be applicable, to support the statute. Yet, no proof or argument was offered. The Second Circuit's speculation about

protecting private conversations in a public courtroom are simply specious. There is no such thing.

Petitioners met their burden of proof as to standing and damages. Respondent's assertion of *United States v. Carolene Products Co.*, 304 U.S. 144, (1938) is clearly distinguishable. It is a matter of commerce - not the fundamental individual rights afforded under the Bill of Rights and made applicable to the States under the 14th Amendment. *Carolene* concerns commercial regulation by the state, and it does not concern access to judicial documents which has its own substantial body of law, together with the First Amendment access rights. As such it is wholly inapplicable to this matter.

This application concerns the reach of the access to judicial documents, both under common law and constitutional scrutiny. It clearly brings up what Petitioners believe is an undecided issue, and that is whether the rights claimed in the application reach as far as the data file recording of the proceedings. Thus, to that extent it envelops a new issue. The fundamental rights affected are long standing in our traditions and jurisprudence.

CONCLUSION

For the reasons set forth above, this Court ought to reject the opposition of Respondent and accept the application of Petitioners and set them down for briefing and argument.

Respectfully submitted,

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