No. 19-874

IN THE

Supreme Court of the United States

WILLIAM ALAN PESNELL, *et al.*,
Petitioners,

v.

JILL SESSIONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the 26th Judicial District Court in and for Bossier Parish, Louisiana and the Louisiana Second Circuit Court of Appeal

REPLY TO THE OPPOSITION FILED BY THE STATE OF LOUISIANA AND JILL SESSIONS 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 ("Petitioners"), hereby reply to the brief in opposition brief (the "Opposition") filed by the State of Louisiana and Jill Sessions ("Respondents"). The opposition is, in many respects, a reiteration of the opposition filed by Jennifer Bolden, and accordingly, all of the arguments in the reply filed to the opposition of Jennifer Bolden are incorporated herein by reference. Accordingly, this reply will be limited to the issues Petitioners believe to be the critical issues raised by the Respondents. Like Ms. Bolden's opposition, the position of Respondents begs the distraction of the Court from the issues at bar. The Opposition is filled with mis-statements, irrelevance, and *illusione* offered to mislead the Court concerning the issues before this Court.

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

Respondent declares in her introduction that William Alan Pesnell ("Pesnell") was a "...lawyer who represented Christopher Holder during his criminal and civil appeals..." Opposition at p. 1. Yet, that is an illusion. There is no doubt that Pesnell represented Christopher Holder during the civil *appeal* of the succession ruling, but Pesnell never represented Christopher Holder in his criminal case, or criminal appeal. See *State v. Holder*, 50,171 KA (La. App. 2 Cir. 12/9/15), 181 So.3d 918, writ denied, 211 So.3d 1166

(La. 12/16/16); writ denied, 212 So.3d 1176 (La. 12/1/16).

Respondents assert that there is a "...procedural machinery that would allow Holder to ensure that there are no factual problems with the trial transcript..." citing La. C.Cr.P. Art. 930. But that article does not stand for that proposition. The first question that must be answered by the issues raised by Respondents is whether that article is the *sole* method by which a person in post conviction relief can obtain documents and evidence. It is not. At the time Christopher Holder made his request for access and a copy of that data file, he was entitled to all rights of review of every citizen in the State of Louisiana, as there was no final judgment of conviction. See La. C.Cr.P. Art. 924.1. Accordingly, Mr. Holder had, at the very least, the same rights as any other citizen. In additions, Holder's request is directly related to his post-conviction efforts now.

Article 930 is part of a series of articles governing post conviction relief. La. C.Cr.P. Art. 926(B)(5) requires an Petitioner to state all errors "...known or discoverable *by the exercise of due diligence."* Mr. Holder's request, therefore, is an exercise under that article which has been refused. Moreover, if one simply reads the position of Respondents later in their brief, then according to them, there is no reason for the trial court judge to grant them access, nor can they compel access to that tape by any process, if in fact that digital recording is an "...internal document...." of the Louisiana judiciary.

See Brief of Respondents, pp. 8-12. That fallacious mis-characterization of the digital recording as an "internal document of the Louisiana judiciary" does not mean that it is not a public record.[1] The document is a public record except for the statute directly challenged by Petitioners. That statute invades the Petitioners substantial rights to access and due process. As with the opposition of Ms. Bolden, the argument is simply a red herring offered to divert the Court's attention from the real issues at bar.

Respondents have now opened the door to the separation of powers doctrine. But the only logical argument related to that issue would be that the legislature cannot enact a statute which binds the judiciary in closing access to a public murder trial. Yet, that does not mean that the digital recording is not a public record. Nor is the Louisiana judiciary a master not answerable to some higher authority. The Louisiana judiciary, like every other governmental office, is answerable to the United States Constitution. Justice demands transparency. The Louisiana judiciary cannot ignore the fundamental rights of its citizens as those fundamental rights are already embodied in the Louisiana Constitution, as acknowledged by the Louisiana Supreme Court. *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. The

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[1] Besides, the Louisiana district court, intermediate appellate court and supreme court ignored the separation of powers issue, which it could have ruled upon sua sponte.

Louisiana judiciary is bound by the dictates of this Court insofar as constitutional access to court documents is concerned. To be sure, the Louisiana Supreme Court has recognized that the construction of the Louisiana Constitution requires the overall construction of the same, taking into account the fundamental rights of its people when construing conflicting provisions. See *City of East Baton Rouge/Parish of East Baton Rouge v. Capitol City Press, LLC*, 2007-CA-1088, 2007-CA-1089 (La. App. 1 Cir. 10/10/08), 4 So.3d 807. Predictably, Respondents' argument on that issue does not even purport to address Petitioner Pesnell's First Amendment rights of access to important documents surrounding a public criminal murder trial.

Finally, Respondents' argument that the district court's local rule and policy on the data file of the trial cannot be considered because the state intermediate appellate court did not address the issue "...at Petitioners' invitation..." is just another *praestigium*. It is not true. In argument, Petitioners declared that the existence of the local rule shows that the digital tape is a public record - without regard to La. R.S. 44:4(47) - because if that statute were valid, then there would be no need for the local rule.[2] Yet, a review of

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[2] Petitioners do not pretend that the Louisiana judiciary or a court cannot have some method of preserving the digital recording or safeguarding its integrity. Yet, that is not what the statute at issue nor the rule accomplish. They completely seal the digital recording from review and comment, creating a star chamber effect where someone within the system can control or manipulate the transcript and therefore the history of events, whether by

the documents show that the standard-less rule was and is illegal on its face and as applied. The rule is nothing more than a *presumptive closure* of the judicial record, made without the requisite hearings and findings required for sealing a record. All other arguments in the introduction will be addressed below to the extent that they were not previously addressed.

(2). ***Whether a favorable decision from this Court would allow Petitioners access to the recording.***

Respondents assert that a favorable decision from this Court would not allow Petitioners access to the digital recording or a copy of the same. Yet, that question has been answered by at least one intermediate appellate court in Louisiana. 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). *Labat* provides a frank and coherent discussion of the rights of access and the fact that the plaintiff in a *civil* proceeding was entitled to not only listen to and inspect the trial tape, but the judge there was ordered to provide a copy of that tape to Mr. Labat.

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design or by simple error.

Here, the defendants below[3] specifically relied on the exception to the public records doctrine passed by the Louisiana legislature after the *Labat* decision. And while there may be arguments regarding whether or not the matter should be remanded to the trial court for further consideration on the judicial necessity of disclosure, Petitioners show that it is unnecessary, as the reasons here are great, the time limitations short, and - nonetheless - a decision must be made on the statute at issue which was the specific defense of the defendants below. That defense was upheld by the Court. Respondents would have this Court deny an application on the grounds that, had the trial court made the correct decision below, there may still be judicial considerations below. Yet, those arguments were not considered below, and if this Court cannot address those now, then this matter should be decided and remanded for appropriate consideration. This case *must* still be decided because the law between the parties now rests on an unconstitutional statute.

As per the directives of this Court and other federal and state courts, the judicial power to protect documents is inherent but not absolute, *and that power is exercised by sealing the particular document or the particular information at issue.* Respondents want this Court to treat the digital recording of a public murder trial as sealed, where no document was ever sealed or even sought to be sealed in that case.

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[3] Represented by Mr. David Sanders, who is the same attorney who represented the State or the Judge in *Labat*. Mr. Sanders knew well the requirements and relied on the new statute passed after the *Labat* decision.

Again, Respondents use a *praestigium* to try to induce this Court into finding that something has been validly protected by the Louisiana judiciary where no such act has ever been taken. The notion that the records of the judiciary are solely controlled by the judiciary in Louisiana was addressed in *Henderson v. Bigelow*, 2007-CA-1441 (La. App. 4 Cir. 4/9/08), 982 So.2d 941, writ denied, 983 So.2d 1282 (La. 6/27/08). That court addressed the issue directly contrary to the analysis of Respondents, leaving the judiciary to protect documents by specific sealing order or closure order - as it should be. The digital recording of a public murder trial is a public record, unless it is sealed. Respondents' position is exactly the reverse of what the law is. Respondents urge that such documents are presumed to be beyond the reach of citizens and directly affected persons based on some imaginary "privacy right" which cannot be reasonably articulated. That is the basis of the trial court and intermediate appellate court decisions as well - that some sort of non-particularized privacy right exists in a public forum which can only be articulated generally. The law is, and rightfully so, that access should be limited only on a finding of a specific, proven substantial fundamental interest which would override the public's right of access.

Contrary to the position of Respondents, the matter rests on the constitutional cases of this Court and lower federal courts construing the rights to access under various constitutional provisions. The lower courts have set out clear parameters for consideration. "Transparency is pivotal to public perception of the

judiciary's legitimacy and independence." *United States v. Madoff*, 626 F.Supp.2d 420 (S.D. NY 2009). As noted by one court, "...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 purposes of that public trial requirement are to prevent the abuse of judicial power, discourage perjury, encourage potential witnesses to come forward, and instill in the public the perception that their courts are acting fairly. *Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5th Cir. 1984). Public trials "...play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence....[and]....assures that the procedures employed are fair." *Id.* at 201-202. A trial is a public event, and what transpires in those proceedings is public property. *Craig v. Harney*, 331 U.S. 367, 374 (1947). The claims made by Petitioners are worthy of those considerations.

(3). *Whether the district court local rule is at issue.*

Respondents assert that the district court local rule is not at issue. While the intermediate appellate court did purport to ignore it based on its ruling, Petitioners show that if this Court deems it to be outside the scope of review, nonetheless, this matter must be decided and remanded for a decision directly

on that point, in the event that this Court grants Petitioners' petition and rules in Petitioners' favor. Petitioner believes that this Court still has jurisdiction to review that local rule now. The local rule was made a substantial issue in the case, and it is facially invalid in that (1) it provides no parameters for decision, (2) it effects a closing of a public criminal trial without the required hearings and findings for sealing a record or portion thereof, (3) it applies the same improper standard of a non-specific arbitrary rule with no standards for decision.

(4). ***The issues on the merits.***

Respondents attempt to show that there is no relief on the merits. Many of the issues there have already been discussed and will not be reiterated here. Petitioners adopt herein by reference all of the arguments surrounding the fundamental interests involved here, and the required showing of a compelling government interest in the statute. Petitioners disagree with Respondents' substantive due process claims. There must be a substantive right to access the instrument by a convicted person in the post conviction relief period. It is that data file recording that contains the exact events that transpired. Absent a substantive right of access, no convicted person can obtain the information to ensure the appeal rights were protected.

Petitioners submit that the reasons put forth by the trial court and the intermediate appellate court are frivolous. There are no reasonable expectations of

privacy in a public courtroom where everything is recorded. That unbelievable assertion of unsound "logic" does not meet even the rational relationship test, because its not rational.

Respondents' claim that there was some other procedure available is an illusion. Petitioner Pesnell was not a party to any other proceeding and had no other remedies available to him. Respondents have not shown and cannot show this Court any procedure or remedy that Holder could have sought or undertaken which would have afforded him the information requested. Moreover, Respondents theory ignores that Petitioners proceeded under a specifically provided for methodology of obtaining the information. While this is not a criminal case, the information sought by Holder is directly relevant to his post conviction relief efforts.

While acknowledging that there is a First Amendment right to access, Respondents attempt to avoid that right by the citation of *Houchins v. KQED*, 438 U.S. 1 (1978). *Houchins* is not dispositive of the issues presented here. As noted by one lower court federal judge, "...The issue...in *Houchins*...was 'whether the news media have a constitutional right of access to a county jail over and above that of other persons..." *Detroit Free Press, et al. v. Ashcroft*, 303 F.3d 681, 694 (6th Cir. 2002). *Houchins* has nothing to do with the access rights afforded to criminal proceedings. In any event, *Houchins*, has no precedential value here. Three Justices voted for the opinion, and three Justices voted against the opinion.

The concurring Justice only concurred because he thought the injunction sought was too onerous - not that an injunction was improper. *Houchins* was, in substance and effect, a plurality for access, not restriction.

CONCLUSION

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

Respectfully submitted,

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