IN THE SUPREME COURT OF THE STATE OF VERMONT

Gray Television, Inc.,
Appellant

. . .

In re VSP-TK/1-16-18 Shooting

Supreme Court Docket Number 2018-392

[Appeal
from the
Vermont Superior Court
Washington Criminal Division
Docket Number 1-1-18 Wncm]

Appellant's Reply Brief

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Preliminary Statement

This case presents a straightforward question: Are members of the public allowed to see the court decisions that interpret and apply Vermont's statutes and shape its common law?

The U.S. Constitution says yes. Citizens have a right of access to judicial proceedings and records pursuant to the First Amendment, *Press-Enter. Co. v. Super. Ct.* ("*Press-Enterprise II*"), 478 U.S. 1, 9 (1986), and this right applies with particular vigor to court orders and opinions, as "public oversight of the courts, including the processes and outcomes they produce, would be impossible" otherwise, *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 267-68 (4th Cir. 2014).

The Vermont Rules for Public Access to Court Records (the "Rules") agree. Those Rules provide that "[t]he public shall have access to all case records," subject only to a narrow set of exceptions that does not include court decisions. Vt. Pub. Acc. Ct. Rec. Rule 6(a)-(b).

Appellant WCAX-TV filed this appeal because, when presented with this same question below, the Superior Court incorrectly followed Vermont's test for access to *agency* records, not *court* records. That led the court to withhold from the public a February 16, 2018 decision that was the first judicial interpretation of Vermont's newly enacted reporter's shield law (the "Subpoena Decision"). As WCAX-TV demonstrated in its Opening Brief ("Br."), the resulting denial of access was clear and reversible error under both the Rules and the First Amendment.

In its Opposition ("Opp."), the State does not dispute that the First Amendment right of access applies to judicial opinions, and it does not even attempt to argue that sealing the Subpoena Decision is "essential to preserve higher values and is narrowly tailored to serve that interest," as would be necessary to overcome the constitutional access right. *State v. Favreau*, 173 Vt. 636, 639, 800 A.2d 472, 476 (2002) (quoting *Press-Enterprise II*, 478 U.S. at 9). Instead, the State attempts to compound the error below. For one, the State offers the novel

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proposition that if a ruling is "derived" from "testimony or evidence" arising out of a process to which the public does not have access, that decision *itself* must remain secret. Such a rule would amount to a sweeping restriction on access to judicial opinions that have historically been available to the public. For another, the State argues that when a party seeks judicial relief under both a state statute and the Constitution, a court may "eschew" the constitutional analysis if it finds that the statute does not provide the relief sought. This approach flips constitutional law on its head. Statutes may provide *additional* rights beyond those found in the Constitution; they cannot *limit* the rights that the Constitution guarantees.

Though it is difficult to understand how the State could wholly fail to address the clear and controlling case law on the right of access to judicial records, it is easy to see why the State hopes to keep this decision a secret. When Vermont enacted its new shield law in 2017, it expanded the scope of the reporter's privilege. *See* Vt. Law 2017, No. 40, eff. May 17, 2017 (codified at 12 V.S.A. § 1615) (the "Vermont Shield Law"). Shortly thereafter, WCAX-TV invoked the Shield Law for the first time in response to a subpoena from the State, and the Superior Court quashed that subpoena in its sealed Subpoena Decision. Since February 2018, therefore, other Vermont journalists have been kept in the dark about how the Shield Law might be able to protect their newsgathering activities, and if they have in fact received subpoenas during that time, their attorneys were prevented from finding the Subpoena Decision in official reporters or electronic databases to learn how the Shield Law has been interpreted or cite the Subpoena Decision in support of their own motions to quash.

The Superior Court erred in denying WCAX-TV's unsealing motion, and the State's arguments in favor of affirmance are inapposite and unavailing. This Court should accordingly reverse and order that the Subpoena Decision promptly be made available to the public.

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Argument

WCAX-TV established in its Opening Brief that the Superior Court erred in two principal respects. First, the court below analyzed WCAX-TV's request for access to the Subpoena Decision – a judicial opinion – under the Access to Public Records Act rather than the applicable Rules. Br. 9-15. Second, the court below overlooked the right of access to the Subpoena Decision arising independently out of the Constitution. *Id.* at 15-21. The State has done nothing to meaningfully challenge, let alone refute, either of these arguments.

I. THE COURT ERRED IN TREATING THE SUBPOENA DECISION AS AN AGENCY RECORD RATHER THAN AS A JUDICIAL RECORD

The Superior Court's first error was treating the Subpoena Decision as if it were an agency record instead of a court record. As WCAX-TV has shown, *see* Br. 10, when Vermont courts oversee inquests, they engage in "the exercise of *judicial* power." *In re D.L.*, 164 Vt. 223, 230, 669 A.2d 1172, 1177 (1995) (emphasis added); *State v. Tonzola*, 159 Vt. 491, 497, 621 A.2d 243, 246 (1993) (inquests are "judicial proceeding[s]"). Moreover, in issuing the Subpoena Decision specifically, the court below adjudicated whether the Shield Law empowered WCAX-TV to protect newsgathering materials from a demand for their production by State prosecutors – a classic example of a court exercising its judicial power to interpret the scope of a statute and apply the facts to the law. *E.g.*, *State v. Aubuchon*, 2014 VT 12, ¶ 18, 195 Vt. 571, 90 A.3d 914 ("it is the task of the judiciary . . . to interpret a statute").

When WCAX-TV moved to unseal the Subpoena Decision, however, the Superior Court did not apply the Rules, which on their face "govern access by the public to the records of all courts." Vt. Pub. Acc. Ct. Rec. Rule 1. Instead, the Superior Court applied the Access to Public Records Act ("<u>PRA</u>"), which governs access to the "record[s] of a *public agency*." 1 V.S.A § 316(a) (emphasis added). "Public agency" is a defined term, meaning "any agency, board,

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department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State." *Id.* § 317(a)(2). Courts are conspicuously absent from that list. *Cf. Herald Ass'n, Inc. v. Judicial Conduct Bd.*, 149 Vt. 233, 240 n.7, 544 A.2d 596, 601 n.7 (1988) ("It is doubtful that the public records law applies at all to judicial records in view of the specific statutes in the trial courts and the power of the judicial branch over its records.").

In its Opposition, the State never substantively addresses the threshold question of whether the Subpoena Decision should be treated as a judicial record or an agency record. Citing no authority, the State argues only that rulings on motions to quash inquest subpoenas are "necessarily based upon" information that is "adduced" by the inquest, and suggests that those rulings should be treated as part and parcel of the inquest itself as a result. Opp. 10-11. But this proposition does not withstand scrutiny. Prosecutions for making false statements at an inquest, for example, are equally "based upon" information that is "adduced" by inquests, yet decisions in those cases have long and consistently been treated as ordinary judicial records. *E.g.*, *Tonzola*, 159 Vt. 491, 621 A.2d 243 (defendant prosecuted for perjury for lying at inquest); *State v. Wheel*, 155 Vt. 587, 587 A.2d 933 (1990) (same); *State v. Woolley*, 109 Vt. 53, 192 A. 1 (1937) (same). The State's proposed rule would therefore render secret a wide swath of decisions that historically have been available to the public. The State makes no other effort to assert that the Subpoena Decision should have been treated as an agency record, nor could it prevail on such an argument given the clear language of both the PRA and the Rules.

The Superior Court's use of the PRA instead of the Rules was consequential and clearly in error. Br. 9-15. Because it treated the Subpoena Decision as if it were an agency record, the Superior Court found that it was categorically "exempt from public inspection and copying"

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simply because it was "relat[ed] to the detection and investigation of a crime." Order at PC2 (citing 1 V.S.A. § 317(c)(5)). If the Superior Court had applied the Rules, however, it would have been able to seal the Subpoena Decision only "upon a finding of *good cause* specific to the case before the judge and *exceptional circumstances*." Vt. Pub. Acc. Ct. Rec. Rule 7(a) (emphases added); *see also* Br. 12-13. That would have required the court to engage in a four-part inquiry to determine: (1) if release poses a substantial threat to the interests of effective law enforcement or individual privacy and safety; (2) if the parties have demonstrated the requisite harm with specificity as to each document; (3) if redaction or other alternative means could provide a less restrictive manner of protecting such interests; and (4) if fact-specific findings could be made for each particular record as to why the presumption of access has been overcome. *Id.* at 13 (citing *In re Sealed Documents*, 172 Vt. 152, 161-62, 772 A.2d 518, 527 (2001)).

WCAX-TV has shown, and the State does not dispute, that the order on appeal made *no* findings on *any* of these factors. *Id.* at 13-15. Moreover, the Superior Court could not possibly have justified sealing under this test: release of the Subpoena Decision would not pose "a substantial threat" to anything; the State has not identified any tangible harm that would occur from release of the decision; the State has not shown why redactions could not adequately alleviate any concerns about release of the decision; and the record contains only general considerations about the secrecy of inquests, not specific findings about why the presumption of access has been overcome with respect to the discrete judicial record at issue. *Id.*

Especially given the vast amount of already-public information about the underlying investigation in this matter, *id.* at 4-6, the State cannot possibly make the showing of "good cause" and "exceptional circumstances" required for the Subpoena Decision to remain under

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seal. *In re Sealed Documents*, 172 Vt. at 161-62, 772 A.2d at 527; *In re Essex Search Warrants*, 2012 VT 92, ¶¶ 16-20, 192 Vt. 559, 60 A.3d 707. The Subpoena Decision is not capable of being sealed pursuant to the Rules, and the Superior Court's application of the PRA instead of the Rules therefore constitutes reversible error.

II. THE COURT FURTHER ERRED IN FAILING TO ACCOUNT FOR THE FIRST AMENDMENT RIGHT OF ACCESS

The Superior Court's next error was failing to consider whether WCAX-TV has a right of access to the Subpoena Decision under the First Amendment, independent of whether the Subpoena Decision is subject to unsealing under the Rules. This error, again, was both clear and consequential: if the Superior Court had properly considered the First Amendment access right, it would have been constitutionally required to unseal the Subpoena Decision.

WCAX-TV made clear in its Opening Brief that the First Amendment provides citizens with a right of access to court proceedings and documents. Br. 16. To determine whether a given judicial record or proceeding is subject to this constitutional access right, courts apply the "experience and logic" test, which asks (1) "whether the place and process has historically been open to the press and general public" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Greenwood v. Wolchik*, 149 Vt. 441, 443, 544 A.2d 1156, 1158 (1988) (quoting *Press-Enterprise II*, 478 U.S. at 8). Experience and logic both support applying this constitutional right of access to the Subpoena Decision.

As to ***experience***, WCAX-TV has already pointed this Court to numerous decisions, in Vermont and elsewhere, providing public access to judicial opinions and rulings arising out of contexts such as inquests or grand juries where the underlying proceedings are closed. Br. 17-19 (collecting cases). Even more closely analogous, courts routinely make public their decisions arising out of journalists' refusal to comply with grand jury subpoenas. *E.g.*, *In re Grand Jury*

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Proceedings, 810 F.2d 580, 581 (6th Cir. 1987) (grand jury subpoena for footage of gang members); *In re Grand Jury Matter*, 764 F.2d 983, 984 (3d Cir. 1985) (grand jury subpoena for documents relating to research for book about the Vatican); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (grand jury subpoena for bombing suspects' communique to radio station); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 26 (D.D.C. 2004) (grand jury subpoenas for testimony regarding journalists' conversations with confidential source); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 3 (D.D.C. 1996) (grand jury subpoenas for testimony and documents relating to 60 Minutes report); *In re Grand Jury Subpoena ABC, Inc.*, 947 F. Supp. 1314, 1315 (E.D. Ark. 1996) (grand jury subpoena for transcript and interview video); *In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 92-93, 907 A.2d 505, 507 (2006) (grand jury subpoena for newsroom computer workstations and hard drives); *In re Grand Jury Subpoenas Served on NBC, Inc.*, 178 Misc. 2d 1052, 1053, 683 N.Y.S.2d 708, 709 (Sup. Ct. 1998) (grand jury subpoena for unaired footage of violent protest). History thus plainly supports public access to judicial decisions, even in situations where the underlying proceedings are otherwise closed.

As to ***logic***, it is practically self-evident that public access to court decisions – the outcome of the judicial process – plays a significant positive role in the functioning of that process. Br. 19-20; *Co. Doe*, 749 F.3d at 267-68 ("Without access to judicial opinions, public oversight of the courts, including the processes and outcomes they produce, would be impossible."); *Lowenschuss v. West Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976) (the "effective and efficient functioning" of the judicial process "demands wide dissemination of judicial decisions," and "[e]ven that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes"). Indeed, this

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Court has noted that rulings "interpret[ing] a statute for the first time," like the Subpoena Decision, are particularly vital in this regard, as they are "the first authoritative construction of the enactment at issue." *State v. White*, 2007 VT 113, ¶ 9, 182 Vt. 510, 944 A.2d 203 (internal marks and citation omitted).

Perhaps the most salient example of how access to decisions like the one at issue here plays a positive role in the functioning of the judicial system comes from *Branzburg v. Hayes*, where the Supreme Court asked "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." 408 U.S. 665, 667 (1972). This Court grappled with the *Branzburg* decision just two years later, *State v. St. Peter*, 132 Vt. 266, 269-71, 315 A.2d 254, 255-56 (1974), as well as in a pair of more recent cases, *Spooner v. Town of Topsham*, 2007 VT 98, ¶¶ 5-16, 182 Vt. 328, 937 A.2d 641; *In re Inquest Subpoena (WCAX)*, 2005 VT 103, ¶ 6-20, 179 Vt. 12, 890 A.2d 1240. Those later opinions, holding that the First Amendment privilege did not apply to non-confidential materials or criminal inquests, respectively, led Vermont to subsequently enact its new Shield Law, which provided journalists with expanded newsgathering protections. *See* 12 V.S.A. § 1615(b)-(c). Access to each of these decisions thus allowed the law to develop and, ultimately, reach the point where the court below could interpret and apply the Shield Law for the first time in the Subpoena Decision. In sum, logic also weighs squarely in favor of access to the Subpoena Decision.

Because the First Amendment right of access applies to the Subpoena Decision, the court below was obligated to unseal it unless the State could show that continued withholding "is essential to preserve higher values and is narrowly tailored to serve that interest." *State v. Tallman*, 148 Vt. 465, 474, 537 A.2d 422, 427-28 (1987) (quoting *Press-Enter. Co. v. Super. Ct.*

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("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984)). In more granular terms, to overcome the constitutional access right, the State must demonstrate that:

1. There is a *substantial probability* of prejudice to a *compelling* interest if the right is not limited. *Press-Enterprise II*, 478 U.S. at 13-14; *Press-Enterprise I*, 464 U.S. at 510.

2. There is *no alternative* to a limitation of access that will adequately protect against the threatened harm. *Press-Enterprise II*, 478 U.S. at 13-14.

3. Restricting access will *effectively* protect against the threatened harm. *Press-Enterprise II*, 478 U.S. at 14.

4. The restriction on access is *narrowly tailored* to minimize the harm to the public's access rights. *Press-Enterprise II*, 478 U.S. at 13-14; *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (even "legitimate and substantial" interests "cannot be pursued by means that broadly stifle fundamental personal liberties").

The State cannot satisfy even one of these prongs, let alone all of them, with respect to the Subpoena Decision. The State has not articulated any compelling interest being advanced (let alone effectively) by continued sealing, nor has the State shown that no other option could suffice to protect that interest. Br. 20-21. Moreover, blanket sealing of the Subpoena Decision plainly fails the "narrow tailoring" prong: the Superior Court did not address the possibility of releasing a redacted version of the decision, even though it was required to make "findings on the record" as to why redaction would not suffice. *State v. Schaefer*, 157 Vt. 339, 351, 599 A.2d 337, 344 (1991). The First Amendment access right therefore applies to the Subpoena Decision, and the State has not carried its heavy burden to overcome that right and keep the decision under seal. The Superior Court's failure to reach the constitutional right of access was, therefore, another instance of clear and reversible error.

In response to this point, the State asserts only that "the Superior Court eschewed a more in depth analysis of considerations under the First Amendment of the U.S. Constitution; such

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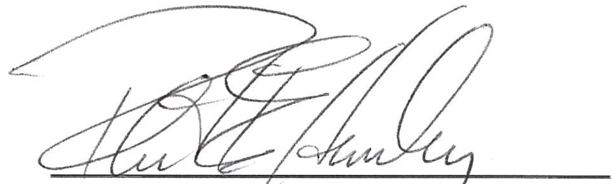
analysis being unnecessary given the uncontested right of the State and judiciary to exercise exceptions to public disclosure statutes." Opp. 15. Yet it is hornbook law that such analysis was required. When the court below denied WCAX-TV the relief it sought as a matter of Vermont law, it was obliged to then determine whether the Constitution independently provided that relief. *Cf. State v. Curtis*, 157 Vt. 275, 277, 597 A.2d 770, 772 (1991) ("Statutory claims are to be considered first, and *if dispositive*, we will not need to reach the constitutional issues."). The Superior Court thus acted in error by "eschew[ing]" an analysis of the First Amendment right of access after having found – also erroneously – that Vermont law alone did not require unsealing.

Conclusion

Because the continued sealing of the Subpoena Decision is improper under the Rules and unconstitutional under the First Amendment, WCAX-TV respectfully asks the Court to vacate the sealing order below and promptly make the Subpoena Decision available to the public.

Dated: Burlington, Vermont
March 8, 2019



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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(i) of the Vermont Rules of Appellate Procedure as it contains 3,961 words as determined by the word counting function of Microsoft Word, which was used to prepare the brief.

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VIRUS PROTECTION CERTIFICATE

Pursuant to Rule 32(b)(4) of the Vermont Rules of Appellate Procedure, the undersigned certifies that the electronic version of this brief has been scanned for viruses and no viruses have been detected.

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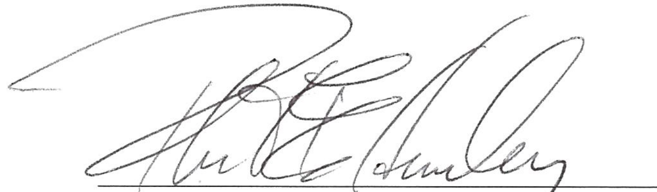

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