THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Gerald C. Smoak, Sr., Circuit Court Judge

Case No. 01-CP-10-2463
Opinion No. 3693

Evening Post Publishing Co., d/b/a The Post and Courier,
And Ms. Parthinea Snowden, as Personal Representative of the
Estate of Edward Snowden, Deceased,.....Plaintiffs,

of whom the Evening Post Publishing Co., d/b/a
The Post and Courier.....Petitioner

v.

City of North Charleston.....Respondent

BRIEF OF THE RESPONDENT

December 20, 2004

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QUESTION ACCEPTED FOR REVIEW

Did the Court of Appeals err by deciding that the facts of this case fall squarely within Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986)?

STATEMENT OF THE CASE

The City of North Charleston (hereinafter, "City") endorses the procedural history (dates) provided in the Brief of the Petitioner. However, additional facts are necessary in order to fully understand the issue presented.

STATEMENT OF FACTS

This case revolves around the City's delay in producing audiotape crime evidence when a pre-trial Freedom of Information Act (hereinafter, sometimes, "FOIA") request was filed by the Post and Courier.

In October 2000, a group of four (4) white men attacked Edward Snowden. See Order, para. 1, R. p. 2, para. 1. A call was placed to 911. Id. at para. 2, 3. The 911 / dispatch tape included conversations not only of the officers and dispatchers, but also contemporaneous comments of witnesses describing the attack and events that followed. Id. at para. 5, 6. The four (4) white males were arrested, indicted, and faced trial on charges of lynching. Id. at para. 7.

The Post and Courier, on June 26, 2001, filed a FOIA request seeking production of the audiotapes. Id. at para. 8. The Post and Courier was informed that

four (4) men were awaiting trial on lynching charges stemming from the recorded incident. The Solicitor of the Ninth Judicial Circuit personally informed representatives of the Post and Courier that he considered the audiotapes to be evidence in those pending cases. Id. at para. 10; see also R. p. 15, fnt. 1 (Plaintiff quoting from July 3, 2001 Letter of Solicitor Hoisington to John Kerr, Esq. (R. p. 79)) Solicitor Hoisington went on to explain that "[t]o the extent that I have a say in the decision, the report will be made available at the conclusion of our prosecution." Id. North Charleston City Attorney J. Brady Hair was simultaneously advised of the Solicitor's position by way of a courtesy copy of this letter. Id. The City of North Charleston accordingly informed the Post and Courier that the tapes were considered evidence for a pending criminal case and were thus exempt from immediate production under S.C.Code Ann. 30-4-40(a)(3)(B)[1]. See Order at para. 11, R. p. 3, para. 11.

Not content with the Solicitor's assessment (or the City's respect for that decision), the Post and Courier filed suit against the City of North Charleston.

Judge Smoak heard testimony and arguments on 5 November 2001. The City presented the testimony of Deputy Solicitor Dale DuTremble, a veteran of over three hundred (300) criminal jury trials (many of high media interest) and the Solicitor handling the criminal case resulting from the Snowden incident. See Order, para. 13-17, R. p. 3, para. 13 – p. 4, para. 17. Mr. DuTremble testified as to ways in which he believed pre-trial disclosure of the tapes to the media would compromise his ability to provide the Snowden criminal defendants with a fair trial. Trans. p. 18, line 21 – p.

[1] This sub-section exempts from disclosure items which would harm the agency by way of a "premature release of information to be used in a prospective law enforcement action."

19, line 8, R. p. 34, line 21 – p. 35, line 8. He also testified that he intended to use the tapes as evidence at the trial set just four (4) months away.[2] Trans. p. 17, lines 15-16, R. p. 33, lines 15-16. In response, the Post and Courier offered no evidence or testimony to suggest that the pre-trial release of the tapes would not compromise the prospects of a fair trial in the lynching cases. See Order, para. 26 and 28, R. p. 6, para. 26 and R. p. 7, para. 28.

Both Judge Smoak and the Court of Appeals ruled in favor of the City.[3] The Post and Courier now appears before this Court questioning whether the above-described situation constitutes the "premature release of information to be used in a prospective law enforcement action" as contemplated in Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (S.C. App. 1986)

SUMMARY OF ARGUMENT

The Court of Appeals was entirely correct in upholding the City's application of S.C. Code Ann. 30-4-40(a)(3)(B) and relying in part upon Turner in so doing. The Solicitor and City were entitled to delay disclosure under S.C. Code Ann. 30-4-40(a)(3)(B) since the requested release would have harmed the Solicitor and Court's ability to provide a fair trial ("prospective law enforcement action"). While the Post

[2] Due to the open nature of the hearing before Judge Smoak, Mr. DuTremble was forced to discuss the contents of the tapes in only general terms in order to avoid mooting the very issue over which the hearing was being held. Notably, though, Judge Smoak himself listened to the tapes prior to issuing his written order. See Order, para. 19, R. p. 5, para. 19.

[3] Subsequent to the filing with the Court of Appeals (but prior to oral argument), the criminal trial occurred, the tapes were released to the Post and Courier, and publication of a transcript followed.

and Courier points out several factual differences between this case and Turner, these differences are distinctions without a difference in terms of this analysis.

ARGUMENT

THIS CASE FALLS WITHIN BOTH S.C. CODE ANN. 30-4-40(a)(3)(B) AND TURNER V. NORTH CHARLESTON POLICE DEPARTMENT, 290 S.C. 511, 351 S.E.2D 583 (Ct. App. 1986).

The tapes sought by the Post and Courier are statutorily exempt from disclosure. Under sub-section 30-4-40(a)(3)(B) of the South Carolina Code of Laws (as amended), information is exempt from disclosure if "the disclosure of the information would harm the agency by: ... the premature release of information to be used in a prospective law enforcement action." That a pending prosecution trial constitutes a "prospective law enforcement action" cannot be questioned. This Court, in State v. Robinson, 305 S.C. 469, 409 S.E.2d 404, 408 (SC 1991), held that "[t]he specific exemption under §30-4-40(a)(3)(B) for the 'premature release of information to be used in a prospective law enforcement action' clearly exempts information regarding pending criminal prosecutions." (emphasis added) See also, Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (S.C. App. 1986).

The Turner case is particularly illuminating since its facts are identical in all relevant respects to those presented by the Snowden tapes in this case. In Turner, a FOIA request was submitted seeking "access to tapes or transcripts of telephone complaints or reports ... concerning the shooting of Janice Fair Turner." Id. The city denied the request upon being informed by the police chief that the tapes "contained very sensitive police communications" on the subject and that the case was "presently

pending for indictment and prosecution in the next few weeks." Id. This denial, based upon the same S.C. Code Ann. 30-3-40(a)(3)(B) involved here, was upheld on appeal.

The rule of Robinson and Turner is unmistakable: evidence to be used in a pending prosecution trial is exempt from FOIA disclosure. It is equally unmistakable that this is exactly such a situation. The Post and Courier acknowledges that four (4) men awaited trial on charges stemming from this incident at the time of its FOIA request. See Para. 7, Complaint, R. p. 14, para. 7. The Post and Courier acknowledges the Solicitor's position was that the tapes were evidence in that case. See fnt. 1, Complaint, R. p. 15, fnt. 1. The uncontradicted evidence (in fact, the only testimony in the record) was that of Deputy Solicitor DuTremble stating that compliance with the Post and Courier's FOIA request would interfere with the State's ability to provide a fair criminal trial.[4] Not surprisingly on these facts the Court of Appeals applied Turner and upheld the City's reliance on S.C. Code Ann. 30-4-40(a)(3)(B).

The Post and Courier invites this Court to second-guess the Court of Appeals. It challenges whether the facts here fall "squarely within Turner." To this the City has responses both general and specific. First, as a general matter, the Court of Appeals result can and should be upheld regardless of whether there might be minor factual differences with Turner. Even were this case distinguishable from Turner's facts, that is a far cry from establishing that the Court of Appeals' outcome must

[4] See Transcript, p. 18, line 21 to p. 19, line 8, R. p. 34, line 21 – R. p. 35, line 8; See also, Transcript, p.19, line 23 to p. 20, line 2, R. p. 35, line 23 – R. p. 36, line 2; See also Hoisington Letter to Kerr, R. p. 79.

change. Second, as a specific matter, the City wishes to respond to the "bullet point" distinctions that the Post and Courier attempts to draw between this case and Turner.

a. The Post and Courier sought "sensitive" information.

The Post and Courier claims to distinguish this case from Turner on the ground that the tape at issue here contained no "sensitive information." The record does not support this argument. Both the Deputy Solicitor's testimony and the letter of Solicitor Hoisington make clear that a premature release of the tape would have compromised the ability of the defendants and the State to experience a fair trial.[5] The Post and Courier put forth no evidence to the contrary. Since revelation of the requested information would have caused such consequences the information is, as a practical matter, "sensitive" almost by definition.

Further, the information at issue here is in some ways *more* sensitive in terms of Section 30-4-40(a)(3)(B) concerns than the "calls from regular informants" or "Crimestoppers calls from citizens" recited by the Post and Courier. See Brief of Petitioner at 4. Granted, information and citizen complaint calls are sensitive and may, at times, deal with the particular crime under investigation. However, a major policy justification in providing "tipsters" with sweeping protection is to protect viable sources of information in general and to protect the safety of informants in the abstract. While important, these interests are not necessarily immediately linked to the case in which there is a "prospective law enforcement action" as contemplated by the FOIA exemption.

In contrast, the interest being protected by the City and Solicitor here was *directly* related to the ongoing prosecution. (Presumably this should be significant since the exception of S.C.Code Ann. 30-4-40(a)(3)(B) specifically mentions a "prospective law enforcement action.") The very "prospective law enforcement action" upon which the refusal was based would be compromised.[6] Thus, when viewed in terms of the concerns underlying Section 30-4-40(a)(3)(B), one must conclude that the information requested by the Post and Courier here was just as "sensitive" as the information in Turner, if not more so.

b. A request that will jeopardize a prospective law enforcement action is no less offensive due to a narrow scope.

The Post and Courier tries to distinguish Turner on the ground that the request here was narrower – it requested only a single tape. The breadth of a request, however, is irrelevant under the exemption test set forth in Section 30-4-40(a)(3)(B). That section tells us that harm to a "prospective law enforcement action" is the yardstick. It matters not whether the request is for one (1) tape or five (5) – if

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[5] See Transcript, p. 18, line 21 to p. 19, line 8, R. p. 34, line 21 – R. p. 35, line 8; See also, Transcript, p.19, line 23 to p. 20, line 2, R. p. 35, line 23 – R. p. 36, line 2; See also Hoisington Letter to Kerr, R. p. 79.

[6] Deputy Solicitor DuTremble testified extensively about the dangers of releasing the tapes. As veteran of over three hundred (300) criminal jury trials and a participant in high media interest cases[6], he was uniquely qualified to comment on the adverse impact of pretrial publicity on the ability to conduct a fair criminal trial. He discussed how the pretrial release of the Snowden tapes could be expected to (a) taint the jury panel, thus compromising the chances of a fair trial and (b) lead to a State Bar inquiry over the ethical violations inherent in such an information release. Transcript, p. 18, line 21 to p. 19, line 8, R. p. 34, line 21 – R. p. 35, line 8. Not only was this Mr. DuTremble's view, Solicitor Hoisington himself had indicated that the tapes should not be released until after trial. Hoisington Letter to Kerr, R. p. 79. See also, Transcript, p.19, line 23 to p. 20, line 2, R. p. 35, line 23 – R. p. 36, line 2. The Post and Courier put forth not a single witness to contradict this position. Order, para. 28, R. p. 7, para. 28.

disclosure would harm a prospective law enforcement action the statute provides an exemption.

c. The criminal defendants' access to the tape under S.C.R.Crim.P. 5 is an irrelevant ground on which to distinguish *Turner*.

The Post and Courier argues that the availability of the tapes to the criminal defendants here under S.C.R.Crim.P. 5 meaningfully distinguishes Turner and undermines the City's reliance on S.C. Code Ann. 30-4-40(a)(3)(B). Under the Post and Courier's view, nothing provided to the criminal defense team could be withheld from a newspaper. Judge Smoak provided several compelling responses[7] to this argument:

> "First, had the Legislature intended for S.C.R.Crim.P. 5 disclosure to be dispositive of the FOIA exception's availability, it could easily have referenced Rule 5 expressly within S.C. Code Ann. 30-4-40(a)(3)(B). The Legislature did not so do. Similarly, were Rule 5 intended to provide media access rights to evidence, the language of S.C.R.Crim.P. 5 might itself reflect such an intent. It does not. Thus, the very language of the statutes and rules involved does not support the Evening Post Publishing Company's position. Second, as a practical matter, injecting the media into disclosures under S.C.R.Crim.P. 5 could lead to absurd results and complications. For instance, what of instances in which information subject to disclosure under S.C.R.Crim.P. 5 is not requested by a Defendant in a conscious effort to avoid the reciprocal discovery obligations of S.C.R.Crim.P 5(b)? Would the Defendant be permitted to use FOIA to access such information and avoid his reciprocal obligations? Would a newspaper be permitted to have such information since it was "available to" a Defendant despite the fact it was not requested? Such a rule would not be feasible. Moreover, a rule injecting the media into Rule 5 analysis would not be limited to tapes such as those at issue here. The logic of

[7] In Paragraph 32 of his Order, he noted that while State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (S.C. 1991), "held that information exempt under S.C.R.Crim.P. 5 could not be backhandedly obtained through the Freedom of Information Act ... the fact that the FOIA may not be used to circumvent Rule 5 says nothing about the existence of the Evening Post Publishing Company's proposed converse rule – that everything available to a defendant under Rule 5 is also available under FOIA to the public at large. At best, Robinson is silent in that regard." R. p. 9, para. 32.

> the Evening Post's proposed standard would permit them pre-trial access to everything from fingerprint laden ransom notes to drug test results. Based on these pragmatic concerns, this Court rejects the Evening Post Publishing Company's proposed "Rule 5" standard.
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> Order, para. 31, R. p. 8, para 31.

In addition to Judge Smoak's reasoning (fully endorsed by the City), there are also other reasons why disclosure to criminal defense counsel under S.C.R.Crim.P. 5 has little relevance to the concerns guiding the application of S.C. Code Ann. 30-4-40(a)(3)(B). For one, the release of the evidence to criminal defense counsel would pose few of the pretrial publicity concerns attendant with release of evidence to the media. This is because, as members of the South Carolina Bar, defense counsel are limited from disseminating information likely to cause pretrial publicity. See Rule 3.6, Rules of Professional Conduct, See also In Re Duncan, 340 S.C. 622, 533 S.E.2d 894 (SC 2000). For another, as participants in a criminal trial before a circuit court judge, criminal defense counsel's disclosure could be readily controlled by Order of the court in a manner not possible with the press.[8] These reasons suggest that S.C.R.Crim.P. 5 simply makes no difference in terms of analysis under S.C. Code Ann. 30-4-40(a)(3)(B).

[8] Besides, even if disclosure to defense counsel would result in some publicity, this is a harm which would truly be unavoidable. It would be impossible to provide the defendants with a fair trial were they denied access to the evidence against them. In contrast, the harms that would result from publicity generated by release to the Post and Courier are entirely avoidable. It is hardly a constitutional necessity that the Post and Courier be provided with the information in order for the defendants to have a fair trial.

d. Non-FOIA based access to the does nothing to distinguish *Turner* since such access did not alleviate the Section 30-4-40(a)(3)(B) harm that would have attended honoring the Post and Courier's request.

The Post and Courier points out that, unlike Turner, in this case the victim did obtain access to the tape. Yet there is a notable difference between Turner and the instant case that makes this fact unpersuasive in terms of avoiding S.C. Code Ann. 30-4-40(a)(3)(B). The victim had a live civil lawsuit underway. That civil lawsuit is significant in three regards: (a) it provided the victim with discovery powers under the Rules of Civil procedure[9] and (b) it subjected the victim's legal team to limits on their ability to disseminate the information since such dissemination would have resulted in pretrial publicity[10]; and (c) it subjected the victim / Plaintiff to court oversight. Thus, providing the victim with access here created no significant risk of prejudice to the criminal prosecution. The harm against which S.C. Code Ann. 30-4-40(a)(3)(B) protects was not triggered. At the same time, release to the Post and Courier would have, according to the uncontradicted testimony of the Deputy Solicitor, harmed the criminal trial. This was true regardless of whether the "victim" obtained the tape through civil discovery. As a result, the Post and Courier's attempt to distinguish Turner fails.

[9] Note that South Carolina's Rules of Procedure do not contain the language found in S.C. Code Ann. 30-4-40(a)(3)(B).
[10] See Rule 3.6 of the Rules of Professional Responsibility.

e. Length of delay is irrelevant under the plain language of Section 30-4-40(a)(3)(B) so long as the request would still be premature.

The Post and Courier tries to distinguish Turner by claiming that the time delay between crime and disclosure in that case was less than that present here. While true, it is not a reasonable ground on which to distinguish Turner. Perhaps the most obvious response to the Post and Courier argument comes from the words of the statute itself. Section 30-4-40(a)(3)(B)'s exemption may generally be said to prevent disclosure when the "premature release" of information would harm a "prospective law enforcement action." While the legislature could have put in a specific time by which production could be delayed, it did not. Instead, it provided a conditional test for disclosure. Disclosure may be refused for whatever amount of time is necessary so long as the request remains "premature" and relates to "a prospective law enforcement action." (This make some sense since harm to a prosecution would not in any way be made less significant if the disclosure could be only briefly delayed, but not long enough to allow the harm to be avoided.)

The irony of the Post and Courier's "time delay" argument becomes apparent when one considers its delay in terms of lodging the FOIA request. The Post and Courier waited almost eight (8) months before it even requested the tape. See ROA pp. 2, 7. By the time the matter came before Judge Smoak, nearly thirteen (13) months had passed. Id. Significantly, though, trial for the Snowden criminal defendants was set for a mere four (4) months later. Id. The Post and Courier's delay argument must be evaluated in light of these timeframes.

When viewed in this light it becomes clear that the court reached the right result. Judge Smoak expressly found that "any significant pretrial publicity generated now would not have ample time to dissipate prior to the anticipated trial. Such publicity could gravely complicate jury selection and undermine both the rights of the State and the Defendant to a fair trial before impartial jurors." Order, para. 27, R. p. 7, para. 27. In contrast, with thirteen (13) months having already passed due to the Post and Courier's footdragging, any danger of this story becoming "yesterday's news" had already occurred. As a result of the Post and Courier's own role in the delay, the time frames in this case do not stand as a convincing ground on which to distinguish Turner.

THE COURT OF APPEALS DECISION IS NOT DANGEROUS PRECEDENT.

Contrary to the Post and Courier's suggestion, the rule it requests would actually pose a far greater danger than the Court of Appeals decision it laments. The Post and Courier claims that the Court of Appeals "cloak[ed] law enforcement officials with a level of secrecy not intended by the FOIA." It further speculates that "[i]t is not inconceivable that public officials will seize on this Court of Appeals decision to conceal future public corruption or prosecutorial conduct." Brief of Petitioner at 6-7. Ironically, its requested remedy– immediate disclosure – would replace the Post and Courier's remote possibility of imagined harm with the *certainty* that society would suffer the exact harm that the Legislature sought to prevent.

The Post and Courier's argument also misapprehends the temporal scope of this FOIA exemption and, as a result, overstates the possible risks. The FOIA

exemption of S.C. Code 30-4-40(a)(3)(B) does not provide a permanent exemption. It does not permit the Government to keep the presence of "public corruption" or "prosecutorial misconduct" secret permanently as would be required for an effective "cover up." Instead, this FOIA exemption permits only the minimum delay necessary in order to avoid jeopardizing a law enforcement action. The Court of Appeals opinion below does nothing to create a rule by which government could keep the people from learning the truth.

THE COURT OF APPEALS CORRECTLY QUOTED STATE V. ROBINSON

It is unclear how the Post and Courier's exception to the Court of Appeals' quotation of Robinson is tied to the question on which this Court granted *Certiorari*. Respondent thus believes that the argument is not appropriately before the Court. However, out of an abundance of caution, the Respondent will state the obvious: the Court of Appeals did not err when it quoted two carefully selected sentences from Robinson. Were courts (or for that matter litigants) required to reproduce every sentence of cited opinions each judicial ruling would in itself require a volume to publish. Instead, the Court of Appeals reasonably extracted the relevant passage from Robinson while omitting Robinson's mention of S.C.R.C.P. 5 since the same was irrelevant to the facts of this case.[11]

[11] Petitioner has previously addressed in comprehensive fashion the reasons why S.C.R.Crim.P. 5 do not alter the analysis of S.C. Code Ann. 30-4-40(a)(3)(B).

CONCLUSION

The Court of Appeals correctly denied the Post and Courier's arguments. The facts of this case, in every *meaningful* way, fall squarely within Turner. The facts of this case also fall squarely within the exception of S.C. Code Ann. 30-4-40(a)(3)(B). The Post and Courier has thus been treated as the law requires.

Respectfully submitted,

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This 20th day of December, 2004.
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