

[J-60-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

COMMONWEALTH OF PENNSYLVANIA	:	No. 2 WAP 2006
	:	
	:	
v.	:	Appeal from the Order of the Superior
	:	Court entered August 22, 2005 at No. 373
	:	WDA 2004, reversing the Order of the
	:	Court of Common Pleas of Allegheny
JAMIE LYNN UPSHUR	:	County entered March 2, 2004 at No.
	:	MISC 410 March 2004.
	:	
	:	ARGUED: September 11, 2006
APPEAL OF: WPXI, INC.	:	
	:	RESUBMITTED: April 13, 2007

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. JUSTICE SAYLOR

DECIDED: JUNE 20, 2007

Appeal was allowed in this case to determine whether an audiotape played at a preliminary hearing is a public judicial record or document to which the media has a presumptive right of access.

In February 2004, Jamie Lynn Upshur was charged by criminal complaint filed in the Pittsburgh Magistrates Court with multiple offenses, including two counts of criminal homicide, apparently arising out of a collision that involved several vehicles.¹ As part of

¹ The record of the underlying criminal case has not been provided with the certified record on appeal, and few allegations of the complaint have been alluded to by the parties.

its prima facie case at Ms. Upshur's preliminary hearing before a magistrate district judge, the Commonwealth played an audiotape allegedly containing a recording of Ms. Upshur's voice as she directed threatening statements toward one of the asserted victims, Timira Brown, several months prior to the events giving rise to the criminal charges. Reportedly, the conversation was part of a three-way telephone call initiated by Ms. Brown and which included Ms. Brown's boyfriend, who was incarcerated in the Allegheny County Jail. The recording occurred pursuant to the facility's policy, under which all calls to or from inmates are preserved via audiotape. Although parties to phone calls with inmates are advised of the recording when the calls are initiated, Ms. Upshur may not have been aware that the conversation was monitored, as she may have been connected via a third-party line after the issuance of the warning.

A reporter for television station WPXI-TV (owned and operated by Appellant WPXI, Inc.) was present at the preliminary hearing when the audiotape was played. Apparently due to public interest regarding this case, WPXI filed a motion for leave to intervene with the magistrate district judge, seeking access to the audiotape in order to make a copy that could be broadcast.² The magistrate, however, did not believe that he was authorized to act on the motion and denied WPXI's request.

WPXI then filed a motion to intervene in the common pleas court, arguing that the public has a right to obtain a copy of a tape recording played in court and that a

² This Court has long held that a motion to intervene is an appropriate method for the news media to assert the public right of access to information concerning criminal cases. See Commonwealth v. Fenstermaker, 515 Pa. 501, 504 n.1, 530 A.2d 414, 416 n.1 (1987); Capital Cities Media, Inc. v. Toole, 506 Pa. 12, 22, 483 A.2d 1339, 1344 (1984). This type of intervention has been described as "provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted." Fenstermaker, 515 Pa. at 504 n.1, 530 A.2d at 416 n.1.

transcript of that tape would not suffice.³ The court agreed and issued an order granting WPXI access to a copy of the tape. In a brief opinion that followed, the court explained that there is a presumption of openness that accompanies criminal proceedings. See Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 573, 100 S.Ct. 2814, 2825 (1980). Further, the court recognized that public access to judicial records was also presumed, see Nixon v. Warner Communications, Inc., 435 U.S. 589, 602, 98 S.Ct. 1306, 1314 (1978), and that this Court had determined that public judicial records or documents must be available for inspection and copying unless the party seeking to seal the materials demonstrated compelling reasons to preclude access, see Commonwealth v. Fenstermaker, 515 Pa. 501, 513-14, 530 A.2d 414, 420-21 (1987). Applying these principles to the present matter, the court concluded that the audiotape in question was a public judicial record for which the presumption of access had not been overcome and emphasized that the tape had been “played out in the open” during the preliminary hearing. Commonwealth v. Upshur, No. 410, March Term 2004, slip op. at 3 (C.P. Allegheny Co. April 1, 2004).

On appeal by the Commonwealth, the Superior Court reversed, concluding that the audiotape was not a public judicial record or document because the tape was not part of the record, as it was never entered into evidence or otherwise filed with the court. See Commonwealth v. Upshur, 882 A.2d 499, 503 (Pa. Super. 2005). Further, the court examined the public policy factors enumerated by this Court in Fenstermaker, 515 Pa. at 507-08, 530 A.2d at 417-18, and determined that release of the tape recording would not discourage perjury, enhance the performance of police or prosecutors, or promote the public perception of fairness and openness in the judicial

³ The scope of the right of access for the news media is identical to that of the general public. See Fenstermaker, 515 Pa. at 504 n.1, 530 A.2d at 416 n.1 (citing Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631 (1965)).

system. Additionally, the court emphasized that there were serious questions as to the admissibility of the recording at trial due to a possible violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701-5782.⁴ Given the likely inflammatory effect of the tape should it be broadcast and the fact that transcripts of the proceedings, including the contents of the recording, were available, the court determined that access to an audio copy of the tape itself was not mandated.

Judge Popovich dissented, expressing the view that the audiotape became part of the record once it was played at the preliminary hearing. See Upshur, 882 A.2d at 506 (Popovich, J., dissenting). Further, Judge Popovich concluded that, since pre-trial publicity does not always render a trial unfair, WPXI should not have been denied access to the recording based solely on the Commonwealth's assertion that broadcast of the tape would be inflammatory.

The Court granted WPXI's Petition for Allowance of Appeal to determine whether an audiotape played at a preliminary hearing is a public judicial record or document to which the common law right of access attaches and, relatedly, whether the common pleas court abused its discretion in granting access in the present matter. As the court did not develop its reasoning with regard to the latter issue in its Rule 1925(a) opinion, however, we remanded the case for preparation of an opinion specifying the rationale, together with any necessary factual findings, supporting the discretionary component of its ruling. In this subsequent opinion, the court explained that access to the tape

⁴ The Wiretapping and Electronic Surveillance Control Act makes it a felony of the third degree to intentionally intercept, use, or disclose the contents of a wire, electronic or oral communication. See 18 Pa.C.S. §5703. However, there are several exceptions, one of which allows State correctional facilities to monitor and record telephone calls made to or from any inmate, so long as certain conditions are satisfied, including the notification of persons calling into the facility that the call may be monitored or recorded. See 18 Pa.C.S. §5704(13)(iii).

recording was presumed, as it had been played at the preliminary hearing. To overcome this presumption, the court observed that the Commonwealth must present compelling reasons warranting denial of access to the audiotape. See Fenstermaker, 515 Pa. at 514, 530 A.2d at 421. However, because the Commonwealth raised the sole issue of contamination of the jury pool, which could be adequately addressed by voir dire or a change of venue, and did not play the tape or offer it as evidence at the hearing, the common pleas court permitted WPXI to obtain a copy of the recording.

As a preliminary matter, we note that the determination of whether an item will be considered a public judicial record or document subject to the common law right of access is a question of law, for which the scope of review is plenary. See Buffalo Township v. Jones, 571 Pa. 637, 644 n.4, 813 A.2d 659, 664 n.4 (2002). However, the trial court's decision regarding access to a particular item will be reviewed for abuse of discretion. See Fenstermaker, 515 Pa. at 513, 530 A.2d at 420.

The common law right of access to public judicial records and documents arose from the presumption that judicial proceedings will be open to the public.⁵ As the Supreme Court has stated, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” Nixon, 435 U.S. at 591, 98 S.Ct. at 1312 (footnotes omitted). This Court has viewed the common law right of access as compelled by many of the

⁵ The United States Supreme Court has held that criminal proceedings are presumed to be open to the public and the press under the First Amendment. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603, 102 S.Ct. 2613, 2618 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827 (1980). Similarly, this Court has recognized a presumption of openness stemming from Article I, Sections 9 and 11 of our State Constitution, which provide that an accused has the right to a “speedy, public trial” and that “all courts shall be open.” See Fenstermaker, 515 Pa. at 506, 530 A.2d at 417; see also Commonwealth v. Contakos, 499 Pa. 340, 344, 453 A.2d 578, 580 (1983) (plurality opinion) (“We are mindful . . . of our virtually unbroken history of public trials and openness in criminal trials.”).

considerations that underlie the presumption of public trials. See Fenstermaker, 515 Pa. at 507, 530 A.2d at 417-18. In the case of arrest warrant affidavits, this Court has stated that:

[F]rom a policy standpoint, public inspection of arrest warrant affidavits would serve to discourage perjury in such affidavits, would enhance the performance of police and prosecutors by encouraging them to establish sufficient cause before an affidavit is filed, would act as a public check on discretion of issuing authorities thus discouraging erroneous decisions and decisions based on partiality, and would promote a public perception of fairness in the arrest warrant process.

Id. at 507-08, 530 A.2d at 418. More generally, the public right to review and copy judicial records and documents provides an important check on the criminal justice system, ensuring not only the fair execution of justice, but also increasing public confidence and understanding. See Richmond Newspapers, 448 U.S. at 572, 100 S.Ct. at 2825 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”).

However, not all documents and materials utilized during court proceedings are subject to the right of access. The threshold question in any case involving the common law right of access is “whether the documents sought to be disclosed constitute public judicial documents.” Fenstermaker, 515 Pa. at 508, 530 A.2d at 418. Some items will fit squarely within the category of public judicial records or documents while others will just as clearly be excluded. For example, transcripts of bench conferences held in camera and notes maintained by the prosecutor and defense counsel during trial are not considered public judicial documents. See id. at 508, 530 A.2d at 418. Certainly, however, any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or

document. See, e.g., Fenstermaker, 515 Pa. at 510, 530 A.2d at 419 (arrest warrant affidavits filed with a magistrate); PG Publishing Co. v. Commonwealth, 532 Pa. 1, 6, 614 A.2d 1106, 1108 (Pa. 1992) (search warrants and supporting affidavits).

Presently, WPXI argues that there is a common law right of access to the tape recording at issue because it was submitted to a court during a pre-trial proceeding where it formed the basis of a decision as to whether an individual accused of a crime will stand trial. In this regard, WPXI contends that the definition of public judicial records and documents does not encompass only materials within the record or otherwise filed with the court, as that would give the public very little to access and, in the case of preliminary hearings, leave the prosecutor in complete control of which materials the public would be entitled to; she could simply choose not to file an item with the magistrate district judge or present the document without actually moving for the item's entry into evidence. Furthermore, in WPXI's view, it would elevate form over substance to determine a document or record's status simply on the basis of whether the item contained an official stamp of the word "filed." In these situations, WPXI asserts, a court must look at substance, not semantics. See, e.g., United States v. Graham, 257 F.3d 143, 152 (2d Cir. 2001) ("Thus, while the defendants are correct that the words 'admitted into evidence' were not used at the hearing, the distinction appears to us to be at most a semantic one, given the presentation of the tapes at the hearing and the district court's reliance on them in making its decision."); United States v. Criden, 648 F.2d 814, 828 (3d Cir. 1981) ("Criden I") ("It would unduly narrow the right of access were it to be confined to evidence properly admitted, since the right is based on the public's interest in seeing and knowing the events which actually transpired.").

In addition, WPXI asserts that, since the audiotape at issue was included in the evidence presented as part of the Commonwealth's prima facie case against Ms.

Upshur in open court and the magistrate district judge was free to rely on the tape in reaching his decision on whether to hold the charges over for trial, it is both public and judicial in character. See Fenstermaker, 515 Pa. at 508-09, 530 A.2d. at 418. WPXI thus views the Commonwealth's argument that the tape was not public because it was not formally filed with the court as raising a distinction without a difference in this case, as everyone attending the preliminary hearing listened to the tape and transcripts of the tape were available upon request.

Moreover, WPXI contends that the policy factors noted above -- enhancing the performance of the system, discouraging perjury, bias, and error, and promoting the public perception of fairness -- militate in favor of finding that a tape recording played at an open preliminary hearing is a public judicial record or document. Further, WPXI applies the policy concerns underlying the presumption of openness that accompanies pretrial proceedings to the present situation, including increasing the public's understanding of the criminal process and the importance of preliminary hearings to the criminal justice system.⁶ Thus, WPXI maintains that the trial court did not abuse its

⁶ The constitutional presumption of openness extends to pretrial proceedings, including preliminary hearings. See Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 10, 106 S.Ct. 2735, 2741 (1986) (“[T]he near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.”); U.S. v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (“Criden II”) (“[T]he public has a first amendment right of access to pretrial suppression, due process, and entrapment hearings.”); accord Commonwealth v. Hayes, 489 Pa. 419, 437-38, 414 A.2d 318, 327 (1980) (concluding that the right of access to pretrial proceedings may not be foreclosed where another method can fully protect the defendant's right to a fair trial). Preliminary hearings, like other pretrial proceedings, are an important part of the criminal justice process. Evidence presented at preliminary hearings and determinations made at pretrial proceedings may dictate whether a full trial will be held. Indeed, preliminary hearings, though often waived, may at times provide the only opportunity for the public to observe the criminal process because the vast majority of criminal cases are disposed of via pleas. See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2466 & n.9 (2004) (noting that approximately 95 percent of felony convictions in state courts in the year 2000 were resolved by guilty pleas).

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discretion in finding that the audiotape at issue is a public judicial record or document and that the Commonwealth failed to meet its burden to demonstrate compelling reasons warranting a denial of access.

The Commonwealth, by contrast, asserts that the recording cannot be considered a public judicial record or document, as the audiotape was never filed with the court, entered into evidence, or otherwise made part of the record. According to the Commonwealth, the Superior Court did not solely base its conclusion on the fact that the recording was not formally entered into evidence; the court also analyzed the policy concerns enumerated by this Court, such as promoting the public perception of fairness and discouraging perjury, and concluded that they were not present in this case. See Upshur, 882 A.2d at 503 (citing Fenstermaker, 515 Pa. at 508, 530 A.2d. at 418). Further, the Commonwealth argues that it would not be in the public interest to allow the media to access exhibits presented at preliminary hearings because doing so would have a chilling effect upon prosecutors, as they would continually need to consider the

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Although Madame Justice Baldwin is correct in pointing out in her concurring opinion that Press-Enterprise arose out of California, the decision is entirely consistent with this Court's past cases. See, e.g., Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 484, 434, 387 A.2d 425, 503 (1978) (explaining that "the right of access to court proceedings should not be limited for any reason less than the compelling state obligation to protect constitutional rights of criminal defendants and the public interest in the fair, orderly, prompt, and final disposition of criminal proceedings" in addressing limitations on access to pretrial suppression hearings). Further, we find no relevant difference between California and Pennsylvania procedure that would suggest a contrary conclusion concerning openness of a preliminary hearing in this Commonwealth. Indeed, in Press-Enterprise the United States Supreme Court referenced Philadelphia Newspapers, among numerous decisions from other states, in support of its observation that "[t]he vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings." See Press-Enterprise, 478 U.S. at 10 n.3, 106 S.Ct. at 2741 n.3.

possibility that pre-trial dissemination of evidence presented solely for the purpose of demonstrating a prima facie case would risk the defendant's right to a fair trial.

While the Commonwealth acknowledges that the tape must be released should it be formally admitted into evidence, see Brief for Appellee at 12-13, n.5 (citing Criden I, 648 F.2d at 814), it distinguishes the present matter as involving a tape played at a preliminary hearing instead of to a jury during trial. Additionally, the Commonwealth contends that the questionable admissibility of the recording at issue due to a possible violation of the Wiretap Act weighs against granting WPXI access, since each extra-judicial publication of an illegally intercepted conversation constitutes a separate violation. See 18 Pa.C.S. § 5703. Thus, the Commonwealth maintains that, even if the tape was subject to the right of access, the trial court abused its discretion in finding that playing the tape in open court and allowing WPXI to obtain a copy of the transcript of the proceeding did not sufficiently protect the right of access under these circumstances. The potential prejudicial impact of the tape, the Commonwealth claims, is significant because hearing the defendant vocalizing threats toward the victim would cause anyone to form substantial bias against the defendant.

As a policy matter, we differ with the Superior Court's analysis of the considerations outlined in Fenstermaker. Although tape recordings played at preliminary hearings are certainly different from affidavits that accompany arrest warrants, this Court has noted the applicability of the policies underlying the right of the public to observe criminal proceedings to the right of the public to inspect and copy judicial records and documents. See Fenstermaker, 515 Pa. at 507-08, 530 A.2d at 417-18. In this regard, allowing public access to preliminary hearing exhibits, like the tape recording at issue, will serve to promote fairness from the outset of criminal proceedings and public confidence in the fairness and efficacy of the criminal justice

system. Contrary to the Superior Court's conclusion, the fact that the tape may later be deemed inadmissible at trial, if a trial is even held, does not negate the benefits of openness at this stage of the proceedings.

We also credit WPXI's argument that the status of materials as "part of the record" or "filed with the court," though relevant, is not necessarily dispositive when deciding whether an item is a public judicial record or document. The common law right of access is based upon the public's interest in knowing about events as they actually transpire and not simply on what is filed with a court or formally admitted into evidence. See Criden I, 648 F.2d at 828; accord United States v. Martin, 746 F.2d 964, 969 (3d Cir. 1984) ("[W]e do not suggest that the fact that requested materials are not in evidence can never be a relevant consideration; we hold only that the district court erred in treating it as a dispositive consideration.") (emphasis in original).

Additionally, this Court has consistently given weight to the character of the materials sought in terms of whether they are of the sort upon which a judge can base a decision. See PG Publishing, 532 Pa. at 6, 614 A.2d at 1108 ("The documents upon which the district justice bases a decision to issue a search warrant are also judicial in character, for the decision to issue a search warrant is a judicial decision."); Fenstermaker, 515 Pa. at 418, 530 A.2d at 509 ("[D]ocuments upon which a magistrate bases a decision to issue an arrest warrant are clearly judicial in character, for the decision to issue a warrant is itself a judicial one reflecting a determination that the affidavits and the information contained therein provide a sufficient basis upon which to justify an arrest."). The Commonwealth's presentation at a preliminary hearing forms the basis of the magistrate district judge's legal decision as to whether the charges will be held for trial, and thus the audiotape at issue was clearly the type of material upon which a judicial decision is based. Further, the disclosure of the tape recording at the

open preliminary hearing and in the form of a transcript, regardless of potential admissibility at trial, renders the Commonwealth's assertion that the tape is not a public document untenable.⁷

Our conclusion that the tape recording at issue is a public judicial record or document, however, does not end the inquiry of whether WPXI will be entitled to a copy of the audiotape. While there is a "presumption--however gauged--in favor of public access to judicial records," Nixon, 435 U.S. at 602, 98 S.Ct. at 1314, the right to examine public judicial documents is not absolute, and courts retain supervisory power over their records and documents. See Fenstermaker, 515 Pa. at 513, 530 A.2d at 420. Indeed, this Court has determined that, "[w]here the presumption of openness attached to a public judicial document is outweighed by circumstances warranting closure of the document to public inspection, access to the document may be denied." Id. The burden of showing that closure is warranted under the circumstances is on the party seeking to prevent access; that party must obtain a court order sealing the documents.

⁷ To the extent that Madame Justice Baldwin, in her concurring opinion, suggests that the audiotape in issue is not a public judicial record or document, her position is contradicted by cases that she references for support. For example, in United States v. McDougal, 103 F.3d 651 (8th Cir. 1996), the federal court expressly distinguished the subject matter of that decision, videotaped deposition testimony of President Clinton as a witness, from audiotapes reflecting the primary conduct of witnesses or parties. See id. at 657. Further, the court specifically indicated that a common law right of public access ordinarily would apply to the latter. See id.

The distinction noted in McDougal also answers Justice Baldwin's concern regarding the asserted tension between media access to court proceedings and Pennsylvania Rule of Criminal Procedure 112. See Concurring Opinion, slip op. at 8. Although the rules may prohibit the recording or broadcasting of courtroom proceedings under most circumstances, they do not apply to the broadcast of an audiotape that is not a recording of the proceedings. See Pa.R.Crim.P. 112; accord Code of Judicial Conduct, Canon 3.A(7). Again, the recording at issue is simply not that of a judicial proceeding, but rather, of the primary conduct of a criminal defendant.

See id. at 513-14, 530 A.2d at 420-21. The decision of whether to seal the documents is left to the sound discretion of the trial court, which must hold a hearing and place on the record its reasoning and the factors relied upon in reaching its decision. See id. Furthermore, upon request, the trial court must inspect the items in camera before reaching its decision. See PG Publishing, 532 Pa. at 9, 614 A.2d at 1110.

The Commonwealth's arguments in this regard focus primarily upon the possibility that the prejudicial impact of the audiotape will violate Ms. Upshur's right to a fair trial, observing that threats made by the defendant to one of the victims would cause potential jurors to form a fixed bias against Ms. Upshur. Similarly, the Superior Court emphasized the potential impact of the tape's contents in audio form, characterizing the audiotape as "highly inflammatory." See Upshur, 882 A.2d at 504. As the common pleas court found, however, the Commonwealth presented no evidence that prejudice would result from a broadcast of the tape recording and, notably, did not request that the trial judge listen to the tape in camera before ruling on the issue of WPXI's right to copy the recording. Although the Commonwealth correctly notes that the possibility that pretrial publicity will affect the defendant's right to a fair trial is important, pretrial publicity is not by itself sufficient to render a trial unfair and prevent public access. See Fenstermaker, 515 Pa. at 513, 530 A.2d at 420 (citing Commonwealth v. Romeri, 504 Pa. 124, 132, 470 A.2d 498, 502 (Pa. 1983) ("[E]ven if there has been extensive pre-trial publicity, a fair trial is not necessarily precluded.")). Indeed, the mere statement of one party that allowing public dissemination of a record or document will prejudice the trial, without additional evidence, does not warrant a denial of access. See id. ("[I]n view of the presumption of openness attached to such documents, it is inconsistent to permit the sealing of such affidavits upon the mere request of a District Attorney or defense counsel.") (emphasis in original); accord Upshur, 882 A.2d at 507 (Popovich,

J., dissenting) (noting that the court should not “declare, based solely on the Commonwealth’s characterization of the audiotape as vivid, powerful and potentially inflammatory, that the release of the audiotape will cause Upshur to have an unfair trial even before the empanelment of the jury and the commencement of trial.”) (internal quotation marks omitted).

Additionally, the trial court determined that the potential contamination of the jury pool could be adequately addressed by voir dire and change of venue. The availability of these reasonable alternatives minimizes the potential impact of public disclosure of the audiotape and weighs against a denial of access. See Fenstermaker, 515 Pa. at 513, 530 A.2d at 420; Commonwealth v. Hayes, 489 Pa. 419, 428, 414 A.2d 318, 322 (1980) (concluding that the closure of a pretrial suppression proceeding may not be ordered “where there is an effective and efficient alternative means to assure the accused's fair trial rights”).⁸

Moreover, although the Commonwealth correctly observes that the questionable admissibility of an item of evidence may be a factor weighing in favor of denying access to a public judicial record or document, it is not a dispositive consideration, as pre-trial proceedings, including suppression hearings, are subject to the presumption of openness, regardless of their outcome. See, e.g., Criden II, 675 F.2d at 557; Hayes, 489 Pa. at 437-38, 414 A.2d at 327. With regard to the present matter, the Commonwealth’s concession that transcripts of the tape recording may be disclosed, see Brief for Appellee at 8-9, undermines its contention that access to the tape should

⁸ We note that a more difficult question regarding the existence of reasonable alternatives might arise should a trial judge, upon listening to an audiotape, determine that voir dire would not sufficiently protect the defendant’s fair trial rights. In the present matter, however, the trial court clearly found voir dire to be an adequate method of protecting Ms. Upshur from any potential prejudice, and the Commonwealth did not present the tape itself to refute that finding.

be denied due to possible violations of the Wiretap Act, as the Act not only creates a separate violation for each publication of an illegally intercepted communication in its original form, but also prohibits each subsequent disclosure of the contents of such a communication. See 18 Pa.C.S. §5703(3).

In view of the trial court's findings, we do not believe that it was an abuse of discretion to permit WPXI to obtain a copy of the tape recording. Indeed, the Superior Court's reliance upon the Commonwealth's characterization of the tape as inflammatory and prejudicial, without the benefit of review of the tape, was erroneous, given the presumption of openness attached to public judicial records and documents,⁹ including the tape recording presently at issue, and the existence of the reasonable alternative of voir dire to a denial of access. See Fenstermaker, 515 Pa. at 513, 530 A.2d at 420. Accordingly, we conclude that audiotapes played during preliminary hearings are public judicial records or documents to which the common law right of access attaches and that the trial court properly permitted WPXI access to a copy of the tape at issue.¹⁰

⁹ We find it unnecessary here to address the split among federal circuit courts of appeals concerning the strength of the presumption of openness, as discussed by Justice Baldwin. See Concurring Opinion, slip op. at 4. Given the lack of evidence presented by the Commonwealth to support its contention that access to the audiotape at issue should be denied, even under the weaker variant of the presumption, the trial court did not abuse its discretion in granting WPXI access to a copy of the tape recording.

¹⁰ We certainly appreciate Mr. Justice Castille's point that the broadcast of a tape recording of the primary conduct of a criminal defendant will likely have a significantly different impact than corresponding quotations from a transcript. Further, we have fully recognized the trial courts' ability, in the sound exercise of their discretion, to deny or limit access (for example, by providing the media with only a copy of a written transcript), in appropriate circumstances and upon due explanation. However, we cannot agree with the apparent suggestion that the audiotape itself is not a public judicial record or document in the first instance simply because a transcript exists, a proposition for which no authority is referenced in the concurrence. Significantly, written (continued . . .)

Finally, Madame Justice Baldwin's characterization of this decision as a "sweeping determination that access to copies of audio (and perhaps video) tapes used in the judicial process must be given to the press," Concurring Opinion, slip op. at 8, reflects a misunderstanding of our opinion, which recognizes the discretion of the trial courts to withhold or limit access to public judicial records and documents in appropriate circumstances, and offers no comment whatsoever concerning videotape recordings of witness testimony, such as were at issue in the McDougal case.¹¹ See supra note 7.

Although the above reasoning represents the view of a plurality, six Justices are aligned in terms of the result that disclosure of the audiotape was within the sound

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transcripts are not always accurate, see, e.g., Commonwealth v. Markman, ___ Pa. ___, ___ n.5, 916 A.2d 586, 596 n.5 (2007), and examination and dissemination of original public judicial records or documents, where appropriate, allows the media, and thereby the public, to carefully and more directly evaluate the performance of the justice system. See, e.g., Littlejohn v. Bic Corp., 851 F.2d 673, 678 (3d Cir. 1988) ("[T]he bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness."). Indeed, courts have frequently distinguished between the common law and First Amendment rights to access on the basis that common law access is to actual copies of public judicial records, whereas the constitution requires only access to the substance of the information contained within such materials. See, e.g., Nixon, 435 U.S. at 598, 610, 98 S.Ct. at 1312, 1318; Commonwealth v. Long, ___ Pa. ___, ___ n.6, ___ A.2d ___, ___ n.6 (2007). Thus, while a trial judge's discretion to withhold or limit access to audiotape recordings of a defendant's primary conduct that have contributed to a judicial decision may be wide, we are unable to agree with the apparent suggestion that it is limitless.

¹¹ As the common law right of access is dispositive in the present case, we need not address any constitutional claims which have been advanced. See P.J.S. v. Pennsylvania State Ethics Com'n, 555 Pa. 149, 153, 723 A.2d 174, 176 (1999) ("[A] court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds."); In re Fiori, 543 Pa. 592, 600, 673 A.2d 905, 909 (1996) ("[C]ourts should avoid constitutional issues when the issue at hand may be decided upon other grounds.").

discretion of the trial court. Accordingly, the order of the Superior Court is reversed, and jurisdiction is relinquished.

Mr. Justice Baer joins the opinion.

Mr. Chief Justice Cappy files a concurring opinion.

Mr. Justice Castille files a concurring opinion in which Mr. Justice Eakin joins.

Madame Justice Baldwin files a concurring opinion.

Mr. Justice Fitzgerald files a dissenting opinion.