No. W2023-00293-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

JOSE MARCUS PERRUSQUIA,

Petitioner – Appellant,

v.

FLOYD BONNER, JR. AND STEVE MULROY,

Respondents – Appellees.

On Appeal from the Shelby County Chancery Court
Case No. CH-22-0820-3

PETITIONER-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In this public records case, Petitioner-Appellant Jose Marcus Perrusquia seeks access to video of an altercation (the "Sally Port Footage") recorded by Respondent-Appellee Floyd Bonner, Jr. (the "Sheriff" or the "Sheriff's Office"). The video was later provided to Respondent-Appellee Steve Mulroy[1] (the "DA" or the "DA's Office") to decide whether to charge Memphis Police Department Officer Brandon Jenkins for his actions captured in the recording.

The DA argues that he is not a "records custodian" of the Sally Port Footage and related investigative records that he reviewed in deciding whether to charge Officer Jenkins with assault. But this novel argument is inconsistent with the TPRA's definitions of "records custodian" and "public records." It is also inconsistent with his own Records Retention Policy and the applicable Records Disposition Authorization ("RDA"). This Court should require the Sheriff to return copies of the records at issue to the DA so that they can be maintained in accordance with that policy and produced to Petitioner-Appellant in response to his TPRA request.

Both the DA and the Sheriff also argue that the Sally Port Footage is exempt from disclosure based on a TPRA exemption related to the security of government buildings. They misconstrue, however, a key exception to this exemption that applies when segments of surveillance

[1] Both the Sheriff and the DA are being sued in their official capacities. Mr. Mulroy was substituted for his predecessor under whom the established facts in this case took place. R. v. 3 at 319.

video show possible criminal activity. Tenn. Code Ann. § 10-7-504(m)(1)(E). Respondents-Appellees contend that application of the exception is wholly discretionary and ignore applicable interpretive rules that instead remove any discretion on the facts presented. In effect, the DA and the Sheriff seek unbridled discretion over whether to release security footage showing possible—and, in this case, actual—criminal activity. This is not what the Legislature intended, and the trial court erred in adopting Respondents-Appellees' misinterpretation of the TPRA. This Court should reverse, confirm that disclosure is mandatory under Tenn. Code Ann. § 10-7-504(m)(1)(E), and order both Respondents-Appellees to release the Sally Port Footage.

The DA and the Sheriff have also waived issues they did not raise with this Court, did not argue in their brief, or both. This includes, among other things, a waiver argument made by the Sheriff regarding its disclosure of the Sally Port Footage, the Sheriff's public policy arguments against release of the Sally Port Footage, and any arguments against the requested injunctive relief if the Court reverses the trial court's decision. Moreover, the Sheriff's waiver and public policy arguments should be rejected as inconsistent with the facts of this case and binding precedent.

Finally, if this Court reverses the trial court, it should award reasonable costs, including reasonable attorneys' fees, for proceedings in the trial court and in this Court because the Sheriff and the DA's actions evading the dictates of the TPRA were willful.

ARGUMENT

I. The DA's Office is a "records custodian" of the Sally Port Footage.

None of the DA's arguments disclaiming his role as a "records custodian" of the Sally Port Footage are availing.

First, the DA highlights the fact that the definition of a "records custodian" in the TPRA refers to an entity that has "*direct custody and care* of a public record." DA's Br. at 10 (emphasis in original). In so doing, the DA ignores the first part of the definition that acknowledges that "direct custody" may arise in "any office, official, or employee of any governmental entity." Tenn. Code Ann. § 10-7-503(a)(1)(C). In other words, the DA's argument presupposes that there can only be one governmental entity with "direct custody and care of a public record," but the statute is not so narrow. Instead, the Legislature defined a "records custodian" expansively to include any governmental entity that takes "direct custody" of a public record as part of its official business. Here, the undisputed factual record confirms that the DA took direct custody of the Sally Port Footage and related records to engage in official business and, therefore, constituted a "records custodian" under the TPRA.

Second, the DA unsuccessfully attempts to distinguish the cases discussed by Mr. Perrusquia and offers not a single case to support his own position. A central component of the DA's argument that he is not a "records custodian" is that it matters from where the DA received the records. The DA argues that cases finding that documents received from non-governmental sources in the course of the government's official business are one type of case, but that, those cases, like *Griffin v. City of*

Knoxville, 821 S.W.2d 921 (Tenn. 1991), would have a different result if the receiving governmental entity had received them from another governmental entity. DA's Br. at 11–13. The DA has cited no authority to support this proposition. And there is no discussion in *Griffin* or the other cases cited and discussed by Mr. Perrusquia that even suggests there would have been a different result if the governmental entity had received the public records from another governmental entity. Perrusquia's Br. at 22–23. Similarly, the DA attempts to distinguish persuasive out-of-state authority because the transfer of records that was challenged was by the original government custodian to a second government custodian. This is a distinction without a difference. Rather, as should be the case here, both governmental entities had a legal obligation in *Chandler v. City of Sanford*, 121 So. 3d 657, 658–60 (Fla. Dist. Ct. App. 2013) to provide access to the requested record; the City of Sanford could not avoid its legal obligations by transferring the records to the prosecutor and only making a redacted version of the records the prosecutor provided back to the City available in response to public records requests. The DA's attempts to distinguish cases like *Griffin* should be rejected.

Examples applying the DA's logic further demonstrate the flaw in his argument. Under the DA's position, an email from the Sheriff to the DA about the official business of both could be deleted by the DA at any time because the email was only received by the DA, whereas the Sheriff created it. In an example closer to the facts of this case, the Sheriff could send an investigative file to the DA for review and if the DA chose to prosecute, the DA could still return the file to the Sheriff once the case

was closed, even though the DA relied upon those materials for making the charging decision and, presumably, prosecuting the case. Surely, the DA denying a request for the records in either scenario would violate the TPRA, as did the DA's actions in failing to retain the Sally Port Footage in this case.

Third, the DA futilely argues that the applicable Records Disposition Authorization ("RDA") and the DA's own Records Retention Policy do not support a finding that the DA is a "records custodian" on these facts. DA's Br. at 14–15. As an initial matter, the DA claims, despite the fact that he no longer possesses the requested public records, he "did not 'dispose' of the surveillance video or the Sheriff's investigative file" but instead "merely returned these records to their original source." DA's Br. at 14. This position is inconsistent with the Tennessee Supreme Court's decision in *State v. Cawood*, 134 S.W.3d 159 (Tenn. 2004). In *Cawood*, a criminal defendant sought possession of recordings "which were introduced in a bench trial and marked as exhibits." *Id*. at 161. The Court found that the requested recordings were public records, relying on *Griffin*. *Id*. at 165. Then the Court looked to the retention and disposal requirements for public records, including Tenn. Code Ann. § 10-7-503 and § 10-7-509, and held that transfer of the recordings to the defendant "is, assuredly, a form of disposal." *Cawood*, 134 S.W.3d at 165–66. In other words, the Court took a commonsense approach to "disposal" under the TPRA, and this Court should do the same and reject the DA's argument that he did not dispose of the Sally Port Footage and other investigative records at issue here.

Next, the DA goes so far as to claim that "nothing in [the] DA's Records Retention policy required it to retain a copy of such records." DA's Br. at 14. The DA is wrong. The RDA and the DA's Records Retention Policy do, in fact, require the DA to retain the records at issue.[2] Instead of looking at the actual language of its own Records Retention Policy, the DA selectively summarizes the policy and, in so doing, ignores its pertinent requirements. DA's Br. at 14–15. The DA's Records Retention Policy plainly states that "[c]riminal case file records include, but are not limited to, . . . law enforcement reports . . . ***received for*** and during the course of the investigation, and other working papers and notations." R. v. 2 at 205 (emphasis added). The Sally Port Footage and related investigative records were plainly "law enforcement reports" received by the DA "for and during the course of [its] investigation" into whether to charge Officer Jenkins with assault of Mr. Lucas. The DA attempts to distinguish the language in its Records Retention Policy by claiming that "the records shared by the Sherriff's [sic] Office did not lead to any charges and, therefore, cannot be considered criminal case files under any reasonable interpretation." DA's Br. at 15. But this assertion, which is at the heart of the DA's argument—that records are treated differently based on whether the DA chose to criminally charge an individual—is inconsistent with the express terms of the DA's Records Retention Policy and the applicable RDA. Similarly, RDA 11152 applies

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[2] While the DA takes issue with Mr. Perrusquia's argument that the applicable RDA supports reversal, DA's Br. at 14, the DA does not make any arguments to the contrary.

to "[r]ecords of district attorney generals criminal investigation," which includes "law enforcement reports . . . received for the investigation." R. v. 2 at 208. As such, under the DA's own policy and the applicable RDA, the Sally Port Footage and related investigative materials should have been retained by the DA and, therefore, the DA was "lawfully responsible for the direct custody and care" of those public records under the TPRA.[3] Tenn. Code Ann. § 10-7-503(a)(1)(C).

Finally, the DA seems to assert that the fact that it improperly disposed of the records at issue is somehow dispositive. DA's Br. at 10, 15. Disposition of a public record, of course, can only happen pursuant to an applicable RDA, Tenn. Code Ann. § 10-7-509(a), and "[a]t no point did the DA's Office contend that it disposed of the requested Sally Port Footage pursuant to a [RDA]," Perrusquia's Br. at 14 (citing R. v. 1 at 14). To allow the DA to avoid its responsibilities under the TPRA by simply handing off requested public records to another agency turns public records requests into a shell game and leads to circumvention of the TPRA. *State ex rel. Matthews v. Shelby Cnty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (courts should "construe all legislation as it is written . . . in a manner to prevent its circumvention").

Neither the TPRA nor any applicable case law supports the DA's argument that it is not a record custodian of the Sally Port Footage and related investigative files it received, reviewed, and relied upon in making a charging decision. Rather, the DA's argument is akin to saying

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[3] The *Cawood* case also looked to the applicable RDA, which also did not support transfer of the records to the defendant. 134 S.W.3d at 166.

that the records at issue were not public records in the hands of the DA. That argument is flatly inconsistent with the TPRA and established precedent. Perrusquia's Br. at 21–24. This Court should reverse the trial court and hold that the DA was a "records custodian" of the requested public records.

II. Release of segments of government building surveillance video showing possible criminal activity is mandatory under the TPRA, not discretionary.

The lone exemption to the TPRA asserted by the Sheriff and the DA is Tenn. Code Ann. § 10-7-504(m)(1)(E), which provides confidentiality for "[i]nformation and records that are directly related to the security of any government building" including "[s]urveillance recordings." Sheriff's Br. at 5–8; DA's Br. at 15–19. A specific exception to this exemption provides that "segments of the recordings may be made public when they include an act or incident involving public safety or security or possible criminal activity." Tenn. Code Ann. § 10-7-504(m)(1)(E). The critical question for this Court is whether the use of the word "may" in the exception to the exemption mandates release or whether release is discretionary. Based on the context of the statute, the requirements of the TPRA generally, and the fact that such release would be in the public interest, "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) should be construed as mandatory.

Both the Sheriff and the DA cite to the same case for the same basic proposition: that "may" "ordinarily connotes discretion or permission; and it will not be treated as a word of command unless there is something in the context or subject matter or the act or statute under consideration

to indicate that it was used in that sense." DA's Br. at 18 (quoting *In re Est. of Rogers*, 562 S.W.3d 409, 424 (Tenn. Ct. App. 2018)); Sheriff's Br. at 6 (same). But neither the Sheriff nor the DA actually applies this test, and both completely ignore the complementary test adopted by the Tennessee Supreme Court in *City of Memphis v. Bethel*, 17 S.W. 191, 195 (Tenn. 1875).

Instead of applying these specific tests for interpreting the use of "may" in an exception such as Tenn. Code Ann. § 10-7-504(m)(1)(E), Respondents-Appellees advocate for the application of general rules. DA's Br. at 18–19 (that "the General Assembly did not use the same defined term demonstrates that it did not intend for that definition to apply to establish the second variable," and that courts "presume[] that the General Assembly used each word in a statute deliberately, and that the use of each word conveys a specific purpose and meaning" (citations omitted)). But when a specific test, or, in this case, tests, apply to decide an issue of statutory construction, it should be the specific tests that control, not general rules. *See Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) (explaining that "a more specific statutory provision takes precedence over a more general provision" when the two conflict).

Critically, both the Sheriff and the DA ignore the fact that the context of the TPRA shows that the "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) should be treated as a word of command. Perrusquia's Br. at 30–34. Tenn. Code Ann. § 10-7-503(a)(2)(B) requires that a "custodian of a public record . . . ***shall*** promptly make available for inspection any public record not specifically exempt from disclosure," and Tenn. Code Ann. § 10-7-503(a)(2)(A) similarly requires that "those in charge of the

records ***shall not*** refuse such right of inspection to any citizen, unless otherwise provided by state law." (Emphases added). Because the exception to the exemption found in Tenn. Code Ann. § 10-7-504(m)(1)(E) states that segments of surveillance video may be released when the video shows possible (and actual) criminal activity, like here, the public record is "not specifically exempt from disclosure" and state law does not "otherwise provide[]." In other words, the context of the provision indicates that the "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) requires that the Sally Port Footage be released.

Similarly, Respondents-Appellees also ignore how the purpose of the TPRA supports interpreting "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) as a command. In fact, the Tennessee Supreme Court's decision in *Bethel*, 17 S.W. at 195, complements this aspect of the *Rogers* "may" analysis: "[W]here power is given to public officers . . . whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. . . . The power is given, not for their benefit, but for [the public's]." Perrusquia's Br. at 33 (quoting *Bethel*, 17 S.W. at 195). Here, there is no doubt that the TPRA is a statute in the public interest and grants individual rights to Tennessee citizens. *E.g.*, Tenn. Code Ann. § 10-7-503(a)(2)(A) (granting Tennessee citizens right to inspect public records); Tenn. Code Ann. § 10-7-505(a) (giving Tennessee citizens the right to sue government for improper withholding of public records); *Cawood*, 134 S.W.3d at 167 ("The Public Records Act reflects the legislature's effort to . . . advance[] the best interests of the public."); *Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297, 305 (Tenn. 1998) (holding that the TPRA is a

"clear mandate in favor of disclosure"); *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994) (explaining that the purpose of the TPRA is "to apprise the public about the goings-on of its governmental bodies"). Thus, under *Rogers* and *Bethel*, because of the subject matter of the TPRA, "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) should be interpreted as a command, not a discretionary power.

The specific subject matter of Tenn. Code Ann. § 10-7-504(m)(1)(E) also supports this interpretation. While Tenn. Code Ann. § 10-7-504(m) generally makes a wide swath of public records related to security of government buildings confidential, the General Assembly's choice to specifically exclude portions of surveillance recordings that show "an act or incident involving public safety or security or possible criminal activity" from that exemption would be nearly meaningless if it was entirely discretionary. The DA's declarant states that even if his office had kept the video in this case, the DA "routinely" denies requests for surveillance recordings. R. v. 2 at 251. Despite the declarant not having reviewed the Sally Port Footage, if it had not improperly disposed of it, the DA still "would deny a Public Records request for such video." *Id.* The Sheriff's declarant gave many general reasons why the Sheriff would not release surveillance video, including, among other things, that "[a]ny public release of video showing the layout of the facility poses a potential security risk." *Id.* at 232. These statements undercut any suggestion that the Sheriff or the DA would actually exercise their asserted discretion. If there is little to no chance that discretion would be exercised, then a discretionary provision would essentially be useless.

But courts "employ the presumption that the General Assembly did not intend to enact a toothless statute." *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 666 (Tenn. Ct. App. 2021). Unfortunately, the only likely circumstances where an agency would release segments of surveillance video showing possible criminal activity would be when doing so would benefit the government in some way. That would turn Tenn. Code Ann. § 10-7-504(m)(1)(E) into a tool for government publicity, not government transparency.

Tennessee's courts have developed specific rules of statutory construction for deciding when "may" is discretionary or mandatory. Here, applying those rules to the facts of this case and the statutes at issue, the "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) should be construed as requiring release of segments of government building surveillance video that include acts of possible criminal activity. As such, the trial court should be reversed.

III. The Sheriff and the DA have waived multiple arguments by failing to raise them in their issues presented and omitting them in their briefs.

"[A]n issue may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Tenn. R. App. P. 27(a)(4)." *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012); *see also Forbess v. Forbess*, 370 S.W.3d 347, 357 n.13 (Tenn. Ct. App. 2011) (holding that appellee waived an issue by not raising it in his statement of issues). Here, the Sheriff has waived his public policy arguments against release of the Sally Port Footage by not raising them as issues presented on appeal. *Compare* Sheriff's Br. at 1 (issues presented), *with*

id. at 7–8 (discussing public policy arguments the Sheriff believes support withholding the Sally Port Footage); *see also infra* Section IV. Similarly, the Sheriff waived his argument that Mr. Perrusquia waived his arguments for direct release of the surveillance video. *Compare* Sheriff's Br. at 1, *with id.* at 9–10; *see also infra* Section V.

Both the Sheriff and the DA also waived any contention that this Court cannot grant Petitioner-Appellant injunctive relief. *See* Sheriff's Br. at 1 (issues presented); DA's Br. at 5 (same); *see also Hodge*, 382 S.W.3d at 335 ("An issue may be deemed waived . . . when the brief fails to include an argument satisfying the requirements of Tenn. R. App. P. 27(a)(7).").

IV. Even if not waived, the Sheriff's public policy arguments are unavailing.

The Tennessee Supreme Court has, in TPRA cases, "refused to create a public policy exception to the legislative mandate of access." *Memphis Publ'g Co.*, 871 S.W.2d at 685. The Sheriff nevertheless argues that "release of . . . internal surveillance video can provide individuals with knowledge of the layout of the Jail facility, including security blind spots and hiding locations," "there are detainee privacy issues with surveillance video inside the Jail," and "audio from recordings can include medical information given by detainees to a nurse." Sheriff's Br. at 8 (citing R. v. 2 at 232). In so arguing, the Sheriff improperly seeks a public policy exception based on the alleged privacy rights of detainees and vague assertions of security concerns. The Sheriff does not cite to any statutes, rules, or cases to support these arguments. As such, the

Sheriff's arguments based on privacy and other public policy concerns should be rejected by this Court.

V. Even if the Sheriff did not waive its argument, Mr. Perrusquia did not waive his request for direct release of the Sally Port Footage from the Sheriff.

The Sheriff boldly claims Mr. Perrusquia "abandoned his request that [the Sheriff] turn over the video in question directly to him." Sheriff's Br. at 9. Mr. Perrusquia did no such thing. But even if he did, as discussed *supra* at Section III, the Sheriff has waived such an argument on appeal by not raising it as an issue presented for this Court's review.

The Sheriff posits that the general rule on waiver is that "questions not raised in the trial court will not be entertained on appeal." Sheriff's Br. at 10 (quoting *City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905–06 (Tenn. 2004)). Mr. Perrusquia plainly raised the issue before the trial court in his Petition which sought, among other things, to have the Court "[o]rder the DA ***and Sheriff*** to immediately provide Mr. Perrusquia with copies of the Sally Port Footage he requested." R. v. 1 at 18 (emphasis added); *see also id.* at 16 ("Therefore, ***both the Sheriff*** and the DA should be required to produce the Sally Port Footage to Mr. Perrusquia . . . ." (emphasis added)); *id.* at 21 (requesting in Memorandum of Law that the trial court "order . . . Floyd Bonner, Jr., in his official capacity as Shelby County Sheriff, to immediately produce the requested public records to Petitioner"); R. v. 2 at 256 (requesting in consolidated reply that the Sheriff and the DA

"immediately produce the requested public records . . . to Petitioner"). This record is sufficient to reject the Sheriff's waiver argument.

The Sheriff's recitation from the show cause hearing transcript is even less availing and, in fact, is disingenuous. The Sheriff selectively cites to statements of undersigned counsel regarding the injunction sought in Mr. Perrusquia's Petition. Sheriff's Br. at 9 (citing Transcript, R. v. 4 at 7:15–9:1). The prior seven lines, however, plainly refute the Sheriff's waiver argument: "As I mentioned this is a public records petition under 10-7-505. It seeks three forms of relief. One is release of footage of an incident between a Memphis police officer and an arrestee at the Shelby County Jail, of what's colloquially called the Sally Port, and it seeks an injunction. The injunction has three aspects." R. v. 4 at 7:8–14. The trial court's order also notes that Mr. Perrusquia asked the trial court to "Order the DA and SCSO to provide a copy of the surveillance video to Petitioner." R. v. 3 at 318. Based on these undisputed facts in the record, the Sheriff's waiver argument is unavailing.

Mr. Perrusquia further preserved the issue on appeal as set forth in his fourth issue presented: "Are the Sheriff and the DA required by the [TPRA] . . . to produce a video recording depicting an act or incident involving public safety or security or possible criminal activity in the Shelby County Jail's Sally Port?" Perrusquia's Br. at 7. Similarly, Mr. Perrusquia requested in the Conclusion of his opening brief that this Court "reverse the decision below and . . . (3) conclude that the Sheriff and the DA were required to disclose the Sally Port Footage in response to Mr. Perrusquia's public records request pursuant to Tenn. Code Ann. § 10-7-504(m)(1)(E)." *Id.* at 37–38. This Court can and, for the reasons

set forth *supra*, should require the Sheriff to produce the requested records to Petitioner-Appellant.

VI. An award of reasonable attorneys' fees and costs for Mr. Perrusquia is warranted in this case.

Should this Court reverse the trial court, the Sheriff and DA's arguments against an award of reasonable costs, including reasonable attorneys' fees, pursuant to Tenn. Code Ann. § 10-7-505(g) in both this Court and the trial court should be rejected.

As an initial matter, the Sheriff's claim that "[t]he trial court's ruling demonstrates that [the Sheriff] was not acting in bad faith" should be rejected out of hand. Sheriff's Br. at 12. A trial court's finding for the public record holder does not foreclose a finding of willfulness. In fact, this Court is empowered to do what it did in *Clarke v. City of Memphis*, 473 S.W.3d 285, 291 (Tenn. Ct. App. 2015): conduct its "own independent review of the record to determine if the evidence presented at trial would support a finding that the City acted willfully." In so doing, the proper standard does not relate to the intent or other state of mind of the Sheriff or the DA; instead "willfulness should be measured 'in terms of the relative worth of the legal justification cited by a municipality to refuse access to records.'" *Id.* at 290 (quoting *Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015)). This Court sits in as good a position, if not better, to evaluate the relative worth of the Sheriff and DA's arguments against access.

And the relative worth of the Sheriff and DA's arguments against access, based on Tenn. Code Ann. § 10-7-504(m)(1)(E), is low. Before both

this Court and the trial court, the Sheriff and the DA cited one of the applicable legal standards for deciding if "may" is discretionary or peremptory. R. v. 2 at 224, 238–39; DA's Br. at 18; Sheriff's Br. at 6. But neither Respondent-Appellee actually applied the test to the circumstances of this case. *See* DA's Br. at 15–19 (failing to discuss application of *Rogers* to circumstances of this case); Sheriff's Br. at 5–8 (same). If they had, as discussed in more detail *supra* and in Mr. Perrusquia's opening brief, Perrusquia's Br. at 30–34, the Sheriff and DA should have come to the same conclusion as Mr. Perrusquia—that this is not the ordinary situation. Rather, this is a situation in which the context and subject matter of the TPRA and Tenn. Code Ann. § 10-7-504(m)(1)(E) do not give the Sheriff and the DA discretion to decide whether to release government building surveillance video segments that show acts of possible criminal activity. This construction is reinforced by a separate, complementary test from the Tennessee Supreme Court that was known to but completely ignored by both the DA and the Sheriff. Perrusquia's Br. at 33–34 (discussing *Bethel*). The Sheriff and the DA should not be able to willfully turn a blind eye to how the facts and circumstances presented require the application of specific interpretive rules.

Similarly, the DA's novel argument that he was not a "records custodian" of the Sally Port Footage is also of low relative worth because it futilely attempts to distinguish the most closely analogous precedent from Tennessee and elsewhere. DA's Br. at 11–13. The same is true of the DA's arguments regarding its own Records Retention Policy and the applicable RDA. *Id.* at 14–15.

Remand on willfulness, thus, is not necessary because this Court is in as good a position to decide willfulness, if not better, than the trial court. DA's Br. at 20–21 (arguing for remand on whether denial was willful). This Court is also in an equally good, if not better, position to determine whether its discretion should be exercised to grant Mr. Perrusquia reasonable costs, including reasonable attorneys' fees, after a finding of willfulness. Although Mr. Perrusquia would not oppose remand for a determination on the amount of reasonable costs, including reasonable attorneys' fees proper in this case, this Court should find, on the record before it and without the need for remand, that the DA and Sheriff willfully refused to provide the requested public records and on that basis award Mr. Perrusquia his reasonable costs, including reasonable attorneys' fees, incurred before both this Court and the trial court.

CONCLUSION

For the foregoing reasons, Mr. Perrusquia respectfully requests that this Court reverse the trial court's decision and grant him the relief he sought in his Petition, including access to the Sally Port Footage, related injunctive relief, and reasonable costs, including attorneys' fees.

Dated: September 26, 2023 Respectfully submitted,

/s/Paul R. McAdoo

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 26, 2023, a true and correct copy of the foregoing was served through the Court's e-filing system on:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the word-count limit set forth in Tennessee Rule of Appellate Procedure 30(e). Based on the word-count function of Microsoft Word, the total word count for all printed text in the body of the brief exclusive of the material omitted under Tennessee Rule of Appellate Procedure 30(e) is 4,984 words. This brief complies with the requirements of Tenn. Sup. Ct. R. 46, § 3.02(a). The text of the brief is 14-point Century Schoolbook font with 1.5 line spacing and 1-inch margins.

Dated: September 26, 2023

/s/ Paul R. McAdoo
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