IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141780

VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

SCOTT A. SUROVELL,

Appellee.

REPLY BRIEF

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REPLY BRIEF FOR THE APPELLANT VIRGINIA DEPARTMENT OF CORRECTIONS

Appellee Surovell and the Virginia Coalition for Open Government (VCOG) misstate the applicable law and misconstrue the Department's arguments. At base, they argue that the Department may invoke the security exemption in Code § 2.2-3705.2(6) only by proving that the release of records "would" cause a security breach. But the plain language requires evidence only that the release would "jeopardize" security or safety. To "jeopardize" means to risk an adverse consequence, not to guarantee its

occurrence. To require proof that a bad consequence "would" occur would gut the security exemption and, more importantly, expose governmental facilities and the public to significant risk of harm. Because the evidence was uncontroverted that releasing the documents at issue here would jeopardize prison security, and because the execution manuals are categorically exempt, the judgment must be reversed.

ARGUMENT

I. To establish that a document "would *jeopardize*" institutional security, an agency need not prove that its release "would *cause*" a particular security breach.

Throughout his response, Surovell mistakenly calls for the Department to prove that releasing the records would actually cause a security breach or harm to persons. (*See, e.g.*, Appellee's Brief at 25-28, 33.) But the security exemption does not hinge on proof that a catastrophic event would result. State agencies do not have crystal balls enabling them to know for certain what a bad actor *would* do if sensitive information fell into his hands. With luck, no harm might come from the release of the most sensitive security protocol. But that does not make it any less entitled to the protections of Code § 2.2-3705.2(6).

The question instead is whether the release of a record "would *jeopardize*" safety or security. Code § 2.2-3705.2(6) (emphasis added).

Jeopardize means simply "to put in jeopardy; hazard; risk; imperil." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 765 (1989). As in: "He jeopardized his life every time he dived from the tower." *Id.* The fact that a high diver is not injured does not prove the absence of serious risk. If releasing information would make it more likely that something bad might happen to a building or a person, the security of that building or the safety of that person has been plainly compromised. It has been jeopardized. And that is the only showing Code § 2.2-3705.2(6) requires.

Here, Mr. Robinson testified that the L-Unit is a secure facility. He testified:

- that the Department receives threats before a scheduled execution occurs;
- that Death Row inmates want to escape, and that they have actually escaped, before an execution; and
- that releasing these documents would make it easier to for someone to attack, infiltrate, or escape from the L-Unit.

(J.A. at 311-13, 316, 319-25, 331-35, 343-52.)

Because that testimony was not rebutted, the Department established that releasing the documents "would jeopardize the security of [a]

governmental facility, building or structure or the safety of persons using such facility, building or structure." Code § 2.2-3705.2(6). The Department did not need to prove that an identifiable security breach *would* result if the documents were released. Such a demanding standard would eviscerate the security exemption and render it functionally useless.

II. The Department is not required to redact a record that falls within the categorical exemption for certain security records.

Surovell and ACOG argue that the Department should be required to provide redacted versions of the execution manuals. They reason that the Department's position would result in agencies being able to avoid FOIA by "incorporat[ing] one line of exempt material . . . into each record it maintains." (Appellee's Brief at 41-42; Amicus Brief at 1-2.) Again, this misstates that Department's position with respect to compelled redaction of a categorically-exempt document.

The Department does not argue that one piece of exempt material—such as a name or an account number—can transform a record into an exempt document. Rather, the Department has focused on the language of Code § 2.2-3705.2(6), which exempts specific "manuals" and "records," and does not contain any language requiring the redaction-and-production of a record that falls within its ambit. This is in contrast to other provisions of FOIA, which exempt only specific information, rather than an entire

record. *See, e.g.*, Code § 53.1-233 (exempting "[t]he identities of persons designated by the Director to conduct an execution"); *see also* Code §§ 2.2-3705.1(13); -3705.7(30); -3706(A)(2)(h); -3706(A)(2)(j); -3706(A)(3).

Thus, the Department does not and has not argued that providing a redacted record is never appropriate. Indeed, the Department—in response to Surovell's FOIA request—produced redacted records. For example, it provided non-exempt maintenance records, after redacting the name of an execution team member. The Department did this because FOIA exempts the identity of an execution team member, but does not exempt the entire record in which that individual is named. Code § 53.1-233. The Department therefore recognized that, although one small piece of information in that record was exempt, it did not make the entire record exempt.

But the FOIA provision at issue here—Code § 2.2-3705.2(6)—paints with broad strokes and provides a categorical exemption. It exempts "drawings," "manuals," "minutes," and "other records." Nothing in that subsection shows any legislative intent to exempt only a portion of such materials. So if a document falls within that category, it ends the inquiry. The responding agency need not redact the information that makes the record exempt and then provide the remainder of that document.

Surovell and ACOG, however, persist in referring to the execution manual as a "mixed," or "partially-exempt" record, and conclude that redaction is required. Of note, the term "partially-exempt" does not appear anywhere in the Virginia FOIA. Nor do the statutes they cite support the proposition that a categorically-exempt record should be broken down into exempt and non-exempt portions.

First, the cited section pertaining to production of electronic records, Code § 2.2-3704(G), refers to multiple records—some exempt and some non-exempt—that are housed in a single database. It does not support the argument that a categorically-exempt record should automatically be parsed out into sections that are exempt and non-exempt.

Second, the claim that the execution manuals are "partially exempt" cannot be grounded in Code § 2.2-3704(B)(2). That subsection provides that a public entity responding to a FOIA request may provide some of the requested records and withhold other records "because a release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter." Code § 2.2-3704(B)(2). That language refers to records, plural. It does not require a single, categorically-exempt record to be divvied up into exempt and non-exempt portions.

Nor does the language at the end of that subsection support a compelled redaction argument. Specifically, Code § 2.2-3704(B)(2) provides that, "[w]hen a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record." *Id.* Read in conjunction with the first sentence of the subsection, it is clear that that language addresses situations where the custodian has exercised his discretion to release part of an otherwise exempt record, or situations where the FOIA exemption—on its face—only exempts a portion of the record. *See, e.g.*, Code §§ 2.2-3705.1(13); -3705.7(30); -3706(A)(2)(h); -3706(A)(2)(j); -3706(A)(3).

FOIA does not require state agencies to affirmatively "un-exempt" a categorically-exempt record, by way of redaction, when responding to a FOIA request. That interpretation would impose an unwarranted and onerous burden on State agencies. This Court should therefore reject Surovell and ACOG's attempt to expand the substantive reach of FOIA by reading language into the security exemption that simply is not there.

III. The sealed documents are properly before the Court.

Surovell is mistaken that this Court cannot consider the sealed documents in the appellate record. (Appellee's Brief at 15-18.) He cites no

case for the proposition that documents submitted on a timely motion for reconsideration, denied by the trial court, are not part of the record on appeal.

To the contrary, this Court has squarely held that a motion to reconsider is the *proper* way to ensure that a claim or argument not previously brought to the trial court's attention is made available in time for the trial court to correct its mistake and to facilitate appellate review. *Majorana v. Crown Central Petroleum Corp.*, 260 Va. 521, 525 n.1, 539 S.E.2d 426, 428 n.1 (2000) ("[H]aving briefed the issue in a post-trial motion for reconsideration, [Appellant] adequately preserved the issue for review in this appeal."). Where the trial court denies the motion to reconsider, as in this case, the issue is properly before the Supreme Court on appeal. *Brandon v. Cox*, 284 Va. 251, 265, 736 S.E.2d 695, 697 (2012).

The documents at issue in this case were drawn to the trial judge's attention and submitted in time to be considered before the trial court lost jurisdiction over the case. The trial court simply did not find that the documents made any difference, and it denied the motion to reconsider within the twenty-one days provided by Rule 1:1. The documents were, therefore, properly made a part of the trial court record under *Majorana* and *Brandon*. And because the documents were transmitted to this Court as

part of the record on appeal, the Court may consider them. *See, e.g.*, Va. Sup. Ct. R. 5:32(a)(2) ("Parts of the record may be relied on by this Court or the parties even though not included in the appendix.").

What is more, Surovell has failed to avail himself of the procedure for objecting to materials that a party claims are not properly included in the record. Under Rule 5:10(b), "[i]f disagreement arises as to the contents of any part of the record [on appeal], the matter shall, in the first instance, be submitted to and decided by the trial court." This rule imposes upon the parties to a prospective appeal the affirmative duty to examine the contents of the record on appeal to ensure that all appropriate materials have been included. If a party believes that additional material should have been included, the party must raise that issue with the trial court prior to the granting of the appeal. *See, e.g., Old Dominion Iron & Steel Corp. v. Va. Elec. & Power Co.*, 215 Va. 658, 660, 212 S.E.2d 715, 718 (1975). Conversely, if a party believes that inappropriate materials have been transmitted to the appellate court, that party has an obligation to submit the issue to the trial court for consideration. Va. Sup. Ct. R. 5:10(b) ("[T]he matter *shall* . . . be submitted to and decided by the trial court." (emphasis added)). This rule makes sense, for the trial court is the entity best situated

to rule on what materials were, and were not, considered by that court when resolving an issue that has been raised on appeal.

Here, the sealed records were transmitted by the trial court as a part of the record on appeal. Their inclusion was plainly noted on the table of contents prepared by the circuit court clerk in accordance with Rule 5:13(b)(ii). Had Surovell wished to object to their inclusion in the record, he was required to raise that issue with the trial court. Va. Sup. Ct. R. 5:10(b). Because he did not, he was waived any objection to their inclusion or consideration on appeal.

IV. This Court may consider the Department's argument that deference should be given to the security decisions of corrections officials.

The Department is not barred from arguing that courts typically defer to the security determinations of corrections officials. (Appellee's Brief at 18-19.) The entire thrust of the September 11 evidentiary hearing revolved around whether the trial court should uphold the Department's decision to withhold these records for security reasons. *See, e.g.*, J.A. at 443 (asking the trial court to dismiss the petition and citing, in support, the "expert assessment of Mr. Robinson, the Chief of Operations of the Department of Corrections," that the documents would "pose a justifiable security risk to the Department if they are released"). The trial court ruled directly on the

issue of whether the Department possessed a legitimate security interest in withholding those documents, and the Department objected to the trial court's ruling. The omission of the specific word "defer" during that hearing does not bar the Department from arguing on appeal that the trial court should have credited the Department's security-related decisions, particularly given the absence of any contrary testimony.[1]

V. The failure to enact S.B. 1393 is irrelevant.

The General Assembly's failure to enact legislation shielding information about lethal-injection-drug suppliers fails to show that it intended for the execution manuals and security protocols at issue here to be nonexempt under Code § 2.2-3705.2(6). (Appellee's Brief at 24-25). The issue here is whether the documents fall within the plain language of Code § 2.2-3705.2(6). In the absence of any statutory ambiguity, the Court does not "rely on rules of statutory construction or parol evidence, unless a literal application would produce a meaningless or absurd result." *Crown*

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[1] The duty of the executive branch to protect the public, and ends-of-justice considerations, would warrant deference to the judgment of Virginia's senior corrections officials even if an explicit request for deference had not been spelled out in the trial court. *See Toghill v. Commonwealth*, ___ Va. ___, ___, 768 S.E.2d 674, 676-77 (2015); *Taylor v. Worrel Enters., Inc.*, 242 Va. 219, 224-25, 409 S.E.2d 136, 140 (1991) (holding that separation-of-powers concerns precluded applying FOIA to Governor's telephone logs over the Chief Justice's dissent that the separation-of-powers claim had not been preserved).

Cent. Petroleum v. Hill, 254 Va. 88, 91, 488 S.E.2d 345, 346 (1997). Surovell has not identified any ambiguities "in the words of the statute itself," and, as such, resort to extrinsic evidence of legislative intent is unwarranted. *Id.*

Even on its own terms, S.B.1393 sheds no light on the issue here. It would have exempted from FOIA the identities of the individuals involved in the compounding process for drugs used to administer lethal injections. S.B. 1393 (2015) (introduced 1/22/15). The bill further contained a catch-all exemption for "[a]ll information relating to the execution process and the buildings devoted to the execution process and all records regarding the equipment used in the execution process," which would also have been exempted from "discovery or introduction as evidence in any civil proceeding unless good cause is shown." *Id.*

The clear purpose of this legislation was to permit the Department to obtain lethal injection drugs through a compounding pharmacy, and to then protect the identity of the compounding pharmacy from public disclosure. It does not follow that failure to enact the compounding bill means that the General Assembly wanted *all* materials and documents pertaining to the L-Unit to be made publicly available through FOIA. The General Assembly could just have readily determined that security-related documents

regarding the L-Unit were already exempt from disclosure, so no new specific FOIA exemption was needed. Or the General Assembly could have determined that it did not wish to enact a restriction on the discoverability of these documents in civil proceedings. Or even on the stretch that S.B. 1393 had something to do with this case, the legislature might have followed its normal tradition of avoiding legislation when lawsuits are pending. Rank speculation about S.B. 1393 is simply unhelpful here.

VI. The fact that some of the material in the execution manual is publicly available does not mean that the entire document has fallen into the public domain.

The Department does not "take[] the stance that *no* details of the execution process . . . may be released." (Appellee's Brief at 38, 41.) At no point has the Department ever said that the entire execution process must be shielded from public scrutiny. Quite the opposite: the Department

> has not and is not attempting to shield from public scrutiny the methodology to be employed when an inmate is executed. The basic procedure that is followed during an execution has been disclosed and is widely available. The names of the substances that could be used during a lethal injection have been disclosed and are widely available. And each and every time the Department modifies a lethal injection protocol, they immediately post a notification to that effect on the VDOC website, https://vadoc.virginia.gov.

(J.A. at 101.) Indeed, the Department provided one hundred and seventy-six documents in response to Surovell's FOIA request, many of which deal specifically with the drugs used in the execution process. (J.A. at 134-148.)

The Department's focus in this case, rather, is upon the security procedures that are followed in the L-Unit when handling a condemned inmate. The interests asserted by the Department involve institutional security and preventing inmate escape. The security-related details in the execution manual, a "security operations procedure," directly implicate those interests. (J.A. at 353-54.)

Thus, the fact that the manual contains some information already known to the public does not mean that the operations manual is no longer FOIA-exempt. For example, if a personnel record contains matters known to the general public (*e.g.*, that the employee was fired), that does not make the personnel record any less FOIA-exempt. Similarly, here, the fact that the manual contains some information known to persons outside the Department does not make it any less a security operations manual, for which the protections of Code § 2.2-3705.2(6) apply.

CONCLUSION

The exemptions embodied in FOIA "reflect the General Assembly's determination that the policy of openness does not override the need for

confidentiality in every circumstance, [and] that the best interests of the Commonwealth may require that certain governmental records and activities not be subject to compelled disclosure." *Taylor*, 242 Va. at 224, 409 S.E.2d at 139. This is just such a case.

The Court should reverse and enter final judgment.

Respectfully submitted,

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(2) On April 27th, 2015, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing, and copies were mailed to **MaryBeth Shreiner, Frank Pietrantonio, Erik Milch, and Michael Mortorano, COOLEY LLP, 11951 Freedom Drive, Reston, Virginia, 20190; Robert E. Lee, Virginia Capital Representation Resource Center, 2421 Ivy Road, Suite 301, Charlottesville, Virginia, 22903**; and **Steven Rosenfield, 913 East Jefferson Street, Charlottesville, Virginia, 22903**.

(3) In compliance with Rule 5:26(e), a digital copy of this brief was submitted to the Clerk of this Court and transmitted to opposing counsel via e-mail delivery.

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