

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

ASSENTED MOTION TO CONDUCT INDIVIDUAL VOIR DIRE AND SEAT ALTERNATE JURORS

NOW COMES the accused, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves the Court, pursuant to agreement with the State, to conduct individual, sequestered, counsel-conducted *voir dire* of prospective jurors in the case, and to empanel a jury including six potential alternates. As grounds for this Motion it is stated as follows:

1. The accused is charged with 23 felony counts: specifically, seven counts each of Manslaughter, Negligent Homicide by DWI, and Negligent Homicide, as well as one count each of Second Degree Assault and Reckless Conduct, all arising from a vehicular crash in Randolph on June 21, 2019, in which seven motorcyclists were killed and another seriously injured.
2. Jury selection is scheduled to begin November 16, 2021, and trial is set to begin November 29.
3. The crash from which these charges arise has been the subject of an extreme amount of publicity, not only in Coös County but throughout New Hampshire and around New England. As of the date of this motion, a search of the *Union-Leader* website using just the accused's name yields 71 stories relating to this case. A

Granted

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
October 20, 2021

similar search of the Boston *Globe* yields 102 stories¹. The WMUR website lists 56 stories under the search term “Randolph crash.” A search of the accused’s name on Google.com yields links to 1,480 videos and over 17,000 news stories.

4. The accused submits that this will be the most anticipated, and the most publicized, criminal case to come to trial in Coös County in more than a quarter century². Additional factors justifying individual, sequestered *voir dire* include the identities of most of the decedents, as well as many potential witnesses, as former U.S. Marines; the accused’s status as an immigrant from Ukraine, and widespread dissemination in the case’s early days of a State Police reconstruction report that plainly, and falsely, identified the accused as having driven across the median and into the oncoming lane, and thus being the sole cause of the wreck.
5. Generally, the manner in which *voir dire* is conducted is wholly within the discretion of the trial court, State v. Webster, 166 NH 783, 795 (2014); subject to the provisions of RSA 500-A:12-a. The traditional practice in New Hampshire has been that individual *voir dire* has only been conducted in murder cases. However, nothing in the state’s statutory structure prohibits such *voir dire* in other cases.

¹ The *Globe* also won a Pulitzer prize for its series on malfeasance at the Massachusetts Registry of Motor Vehicles in which this case played a prominent role; a link to the series is frequently, and prominently, displayed on its web page.

² The only criminal cases to have received comparable notice here in that time period, to the best of undersigned’s knowledge – the shootings of a judge, editor and State Troopers in Colebrook; the mysterious disappearance and ultimate death of a young girl in West Stewartstown; the abduction, year-long imprisonment and repeated assault of a school girl in Gorham – did not go to trial for various reasons.

6. The United States Supreme Court has held that, in certain circumstances, special *voir dire* questioning is Constitutionally mandated by the Due Process clause. See, Ham v. South Carolina, 409 U.S. 524 (1973); Ristaino v. Ross, 424 U.S. 589 (1976).
7. The American Bar Association's Fair Trial Standards provide as follows: "If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial." *Current Fair Trial Standards* § 8-5.4, at 15.
8. Along the same lines, the United States Court of Appeals for the First Circuit has recently held that a fair trial is denied when the trial court fails on *voir dire* to "ascertain not just the degree but the kind of exposure to the case or the parties that the prospective jurors had experienced ... that is, what they had read and heard about the case." U.S. v. Tsarnaev, 968 F. 3d 24, 58 (1st Cir. 2020)(citations omitted); *cert granted*, ____ U.S. ____, 141 S.Ct. 1683 (2021).
9. Other states' courts have held that individual sequestered *voir dire* is mandated in certain circumstances. See, e.g., Leach v. State, 845 SW 2d 11, 15 (Ark. 1993): "[A]t some point pretrial publicity can be sufficiently pervasive that individual sequestered *voir dire* would be mandated because of the likelihood that individual venirepersons have been exposed to prejudicial information"; State v. Cazes, 875 SW 2d 253, 262 (Tenn. 1994): "Where the crime is highly publicized, the better procedure is to grant the defendant individual, sequestered *voir dire*, but it is only where there is a significant possibility that a juror has been

exposed to potentially prejudicial material that individual *voir dire* is mandated. Likewise, questions regarding the content of any publicity to which jurors have been exposed may be helpful in assessing whether a juror is impartial.” (citations omitted); State v. Anderson, 754 SE 2d 761, 765 (W.Va. 2014): “[w]hen a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.”

10. In Massachusetts, the Supreme Judicial Court has mandated individual sequestered *voir dire* upon request in cases involving interracial allegations, Commonwealth v. Young, 517 NE 2d 130 (1987); alleged sexual abuse of children, Commonwealth v. Flebotte, 630 NE 2d 265 (1994); or a potential insanity defense, Commonwealth v. Seguin, 656 NE 2d 1229 (1995).
11. “Part I, Article 35 of the [New Hampshire] Constitution provides, ‘It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.’ This provision for judicial impartiality is applicable as well to jurors. It is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury.” State v. Tabaldi, 165 NH 306, 312 (2013) (citation omitted).
12. RSA 500-A:12-a, III, as amended effective January 1, 2015, to apply to criminal as well as civil cases, provides that counsel for the State and defendant shall have the right “to examine, by oral and direct questioning, any of the prospective

jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause” and further that during such examination “the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.”

13. In this case, given the extreme and protracted level of pretrial publicity surrounding the case, including the inaccuracy of much of what was initially released to the public, as well as the presence of “hot-button” issues such as the decedents’ military service juxtaposed with the accused’s status as a Ukrainian immigrant, the defense contends, and the State agrees, that the interests of justice will best be served by conducting individual *voir dire* of prospective jurors as to issues of exposure to pretrial publicity and/or other issues of potential bias or prejudice; that such *voir dire* be conducted by counsel pursuant to RSA 500-A:12-a; and that it be done out of the hearing of other prospective jurors, lest such others be exposed to instances of prejudicial publicity.

14. The parties jointly propose that such individual sequestered *voir dire* be conducted within a time frame of five minutes for each party, per juror.

15. Furthermore, the parties jointly propose that a total of 18 jurors be impaneled to hear the case, allowing for six alternates. The parties deem this to be an appropriate number in view of a) the anticipated length of the trial herein; b) the impending Christmas holidays in which the length of trial may conflict with jurors’ other commitments; c) the likelihood of continuing pervasive publicity during the trial, and inadvertent exposure of jurors thereto; and d) the continuing incidence of Covid-19 in the community, with the potential for mandatory quarantining of

individual jurors who may become exposed to Covid-positive people over the course of a lengthy trial, as well as the onset of conventional flu season.

16. As noted herein, the State, has expressed its ASSENT to the relief sought hereby.

WHEREFORE, the accused respectfully prays the Court:

- A) To direct that individual, sequestered voir dire be conducted of all prospective jurors as to issues of exposure to pretrial publicity, and/or other issues of bias or prejudice;
- B) That such *voir dire* be conducted by counsel for the respective parties as set forth above;
- C) That at least 18 jurors be impaneled to hear the case, allowing for up to six alternates; and
- D) For such further relief as may be just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 18th day of October, 2021, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq., Assistant Attorney General.



Steve Mirkin