THE STATE OF NEW HAMPSHIRE

COOS, SS SUPERIOR COURT

214-2019-CR-00078

State v. Volodymyr Zhukovskyy

Boston Globe Media Partners, LLC.'s Reply to Defendant's Objection

Now Comes Boston Globe Media Partners, LLC., publisher of the Boston Globe ("Boston Globe"), and replies to Defendant's objection by representing:

1. Defendant first contends that the Boston Globe has no standing or right to intervene in this case. *Petition of Keene Sentinel*, 136 N.H. 120, 125 (1992) holds to the contrary:

> The newspaper has no direct and apparent interest as would a party in the subject matter of the underlying litigation that would warrant its intervention as a party. The newspaper, as well as any member of the public, however, has standing, without having to be made a party in a case, to request access to court records. The newspaper sought to do so through intervention. *Procedurally, this case more appropriately should have been initiated by a petition for access to the sealed records* (emphasis added).

See also, 136 N.H. at 130 ("When a member of the public or the media seeks access to a court record and is denied access because the record has been sealed, the party seeking access shall file a petition with the court requesting access to the record in question (*i. e.*, Petition For Access To Court Records)").

2. Turning to Defendant's contentions on the merits of the petition, they do not meet his burden of proof:

We have repeatedly held that

> under the constitutional and decisional law of this State, there is a *presumption* that court records are public and *the burden of proof* rests with the party seeking closure or nondisclosure of court

> records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records (emphasis added).

Associated Press v. State, 153 N.H. 120, 129 (2005).

3. Defendant notes the extensive media coverage the case received, stating that "[m]uch of the coverage, including the Globe's, treated the Defendant's guilt as a foregone conclusion." Continuing, he "asserts that the nature and extent of such coverage provides the very reason that the identification of the jurors who served on this trial should not be released to the public." Objection at ¶¶ 6-7. But Defendant does not explain the reason supporting his contention. In fact, the coverage Defendant mentions is why the public would benefit from knowing why the jury decided to acquit. As Justice Brennan stated in his concurring opinion in *Nebraska Press Ass'n v. Stuart,* 427 *U.S.* 539, 586-587 (1976):

> Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

4. Referring to the First Circuit's decision in *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990), Defendant states that the Globe failed to "explain how the logic of the [case] ... applies to the question it seeks to present here." Objection at ¶ 10. He overlooks paragraph 15 of the petition, which set forth the First Circuit's instructive reasoning, beginning with:

> Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system.

5. Defendant acknowledges that the New Hampshire Supreme Court has interpreted Part I, Article 8 of the state constitution to require a party opposing disclosure of a court record "to demonstrate *with specificity* that there is some overriding consideration or special interest, that is, a sufficiently compelling interest, which outweighs the public's right of access," citing *Associated Press v. State*, 153 N.H. 120, 129 (2005)(emphasis added). Here, he asserts the compelling interest is "the safety of the jurors themselves." Objection at ¶ 13.

6. In addition to juror safety, Defendant adds, without *specificity*, juror privacy:

> The jurors who served in this case gave up three weeks of their lives. And were no doubt subjected to a lot of pressure from people in their communities who had been convinced by pretrial media coverage of Mr. Zhukovskyy guilt. Having performed their responsibilities without fear or favor, they should be entitled to privacy.

Objection at ¶ 19. Yet, the Supreme Court has ruled that a party's privacy is not a sufficiently compelling interest to override the right of access. In *Petition of Keene Sentinel*, it stated with respect to the privacy of "family and marital matters:"

> We cannot accept such a *blanket assertion* of the privacy right. Courts, as an integral part of the government of our State, are required by part I, article 8 of our constitution to be "open" and "accessible." They are public forums. A private citizen seeking a divorce in this State must unavoidably do so in a public forum, and consequently many private family and marital matters become public (emphasis added).

136 N.H. at 128; see also *Associated Press v. State*, 153 N.H. 120, 137 ("However, a generalized concern for personal privacy is insufficient to meet the State's burden of demonstrating the existence of a sufficiently compelling reason to prevent public access".) Like parties in a marital case, jurors sitting in a criminal case "must unavoidably do so in a public forum," where "people in their communities" might know who they are. *See United States v. Shkreli*, 264 F. Supp. 3d 417, 419 (E.D. N.Y. 2017)(" Despite the long and challenging service of the jury members and

the court's profound gratitude for their service and attention throughout the trial, the privacy interests and preferences of the jury alone are generally insufficient to preclude disclosure of their names.)

7. As for his concern for the safety of the jurors, Defendant cites no evidence that their safety has or will be threatened by providing their names and addresses to the Boston Globe. This absence of evidence is noteworthy given the ten examples he notes of public reaction to his acquittal and Governor Sununu's and the Attorney General's "gratuitous insults." Objection at ¶¶ 15-16. Instead, he mentions that "people who take public positions on a wide variety of issues are routinely subjected to having themselves or their families insulted or harassed … even receiving death threats." But this does not meet his burden of demonstrating a sufficiently compelling public interest to overcome the Boston Globe's right of access. *See generally, Associated Press v. State*, 153 N.H. at 137 ("Referring to the State's assertion that prevention of identity theft is a compelling state interest, the Court stated: "We acknowledge that identity theft is a growing problem. However, the State has offered no empirical evidence linking identity theft to court documents ...."). Defendant, too, has offered the Court no evidence, empirical or otherwise. *See U.S. v. Wecht*, 537 F.3d 222, 238 (3rd Cir. 2008)("Despite these risks, we believe that the judicial system benefits from a presumption of public access to jurors' names."); *United States v. Shkreli*, 264 F. Supp. 3d at 420 ("Here, there is no evidence that the security of any juror would be placed at risk.").

8. Finally, Defendant proposes that rather than disclose the juror names to the Boston Globe, the Court write jurors that "[r]epresentatives of the Globe would be interested in speaking with them" leaving it up to each juror whether to speak with the Globe and, if so, whether "for attribution or anonymously. Objection at ¶ 23. That proposal is substantively no

different than what the Globe represented it plans to do if given access to juror names. See Petition for Access to Juror Names at ¶ 9 ("... a Globe reporter would first respectfully approach jurors and ask if they are willing to be interviewed and, if so, whether they are willing to be named or want anonymity....").

WHEREFOR the Boston Globe respectfully requests the Court to overrule Defendant's objection and grant it petition and such other relief as may be necessary and proper.

Respectfully submitted by its attorneys,

/s/ William L. Chapman
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Certificate of Service

I hereby certify that a copy of the foregoing petition was served via the ECF system upon all parties.

Dated: October 3, 2022

/s/William L. Chapman
William L. Chapman

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