

**STATE OF NEW HAMPSHIRE**

**Superior Court**

**Coos, ss**

**September Term, 2022**

**State of New Hampshire**

**v.**

**Volodymyr Zhukovskyy**

**214-2019-CR-00078**

**MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

**AND**

**MEMORANDUM OF LAW IN RESPONSE TO**

**BOSTON GLOBE'S PETITION FOR ACCESS TO JUROR NAMES**

NOW COMES the New Hampshire Association of Criminal Defense Lawyers, by and through Gary Apfel, Esq., and hereby moves this Honorable Court grant the New Hampshire Association of Criminal Defense Lawyers leave to appear an amicus curiae in the above-captioned matter and accept the following memorandum of law in response to Boston Globe Media Partners, L.L.C.'s petition for access to juror names.

In support of this motion and memorandum, the New Hampshire Association of Criminal Defense Lawyers states as follows:

**I. Statement of Interest.**

1. The New Hampshire Association of Criminal Defense Lawyers (hereinafter "NHACDL") is a voluntary, professional organization of the criminal defense bar in New Hampshire. It has approximately 265 members, both private lawyers and public defenders,

Granted, without objection.

/s/ Peter H. Bornstein  
Honorable Peter H. Bornstein  
September 26, 2022

Clerk's Notice of Decision  
Document Sent to Parties  
on 09/26/2022

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who practice in every county in the state. NHACDL's efforts are primarily directed towards improving the proficiency and professionalism of the defense bar through training, workshops and an internet-based discussion group for members. This serves NHACDL's ultimate mission, which is to ensure, safeguard and promote the effective assistance of counsel in criminal cases. NHACDL also takes public positions on issues of general concern to matters of criminal justice. Thus, when a trial court or appellate decision is likely to have an impact on the underlying procedural fairness of state criminal adjudication, NHACDL also seeks to take a stand.

2. The issues presented in this case relative to the petition for access to juror names filed on behalf of Boston Globe Media Partners, L.L.C. (hereinafter "Boston Globe") are of significant concern to the membership of NHACDL. Its members represent criminal defendants on a daily basis in jury trials across this State. There is no constitutional right more important to defendants than that of a fair and impartial trial by a jury of one's peers. Since colonial days, juries have served as the ultimate check on the abuse of state power, be it by the legislative, executive, or judicial branch of government. See, e.g., James Alexander, *The Tryal of John Peter Zenger* (1738) (detailing the case of Crown v. John Peter Zenger, in which the jury exercised its power of nullification and refused to convict Zenger of seditious libel for making defamatory but true statements about government officials), available at [https://history.nycourts.gov/wp-content/uploads/2018/11/History\\_Tryal-John-Peter-Zenger.pdf](https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf). Inasmuch as Boston Globe's petition, if granted, will serve to intimidate future juries

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from the faithful discharge of their duties, especially in the face of public approbation and potential criticism by government officials, NHACDL has a significant interest in being heard in this matter in order to protect the right to jury trial enshrined in the Sixth and Fourteenth Amendments to the United States Constitution and part I, article 15 of the New Hampshire Constitution.

3. Undersigned counsel is a member of NHACDL's board of directors.

4. Mr. Zhukovskyy, by and through his attorney, Jay Q. Duguay, assents to NHACDL's motion for leave to appear as an amicus curiae.

5. The State of New Hampshire, by and through its prosecutor, Joshua L. Speicher, Esq., takes no position with respect to NHACDL's motion for leave to appear as an amicus curiae.

6. Boston Globe, by and through its attorney, William L. Chapman, Esq., takes no position with respect to NHACDL's motion for leave to appear as an amicus curiae.

**II. Statement of Facts and Procedural Posture.**

1. On June 21, 2019, Volodymyr Zhukovskyy and members of the Jarheads Motorcycle Club were involved in a traffic accident on Route 2 in Randolph, New Hampshire. Seven motorcyclists died as a result of this accident.

2. The State arrested Mr. Zhukovskyy and subsequently obtained twenty-three indictments, alleging negligent homicide, negligent homicide due to driving under the influence, reckless manslaughter, aggravated driving while intoxicated, and reckless conduct.

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3. The case received intense media scrutiny for the three years between the accident and trial in July and August, 2022. The vast majority of this publicity was hostile to Mr. Zhukovskyy. Boston Globe's petition contains multiple examples of this negative reporting, including quotations from articles by its own writers.

4. Following the close of the State's presentation of evidence, the Court, Bornstein, J., dismissed a number of counts. Following the close of Mr. Zhukovskyy's case, the jury deliberated for less than three hours before returning not guilty verdicts on the remaining counts.

5. New Hampshire Rule of Criminal Procedure 28(b) provides that “[a]t no time . . . shall an attorney, party or any person acting for either of them ask questions of or make comments to a juror that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service.” Despite this rule, Governor Christopher Sununu (the highest elected representative of party State of New Hampshire) and Attorney General John Formella (the highest appointed attorney of party State of New Hampshire) each impugned the integrity of the jury in public statements to the media (which statements are quoted in Boston Globe's petition), and thereby indirectly communicated their dissatisfaction to the jury itself. On information and belief, Mr. Formella's conduct is currently the subject of a complaint before the Professional Conduct Committee. See Nancy West, “Watchdog Files Complaint Against AG for Criticizing Verdict in Zhukovskyy Case” (Aug. 11, 2022),

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<https://indepthnh.org/2022/08/11/watchdog-cop-files-complaint-against-ag-for-criticizing-jurors-verdict-in-deaths-of-7-motorcyclists/>.

6. The jury's verdict has generated significant vitriolic responses from members of the public, as is documented in Mr. Zhukovskyy's objection to Boston Globe's petition.

7. On August 22, Boston Globe filed its petition for access to juror names. This petition in fact seeks not only their names, but also their residential addresses. Boston Globe proposes no restrictions on its ability to contact jurors, such as prohibitions on visiting their homes or workplaces or limits to certain hours of the day or night.

8. On August 24, the Court issued an order, directing the State and defense counsel to file an answer or other responsive pleading to Boston Globe's petition on or before September 23, 2022.

**III. Arguments of Law.**

**A. New Hampshire Statutory and Constitutional Authority Prohibit Disclosure of Juror Names and Addresses to the Media.**

1. As a matter of public policy, the New Hampshire General Court has determined that information about jurors is not generally discoverable by members of the public.

2. More specifically, N.H. R.S.A. Chapter 91-A governs access to governmental records and meetings. The general policy regarding public records is to foster broad access: Thus, the preamble to the Right to Know Law states “Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies,

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and their accountability to the people.” R.S.A. 91-A:1. Consistent with this broad general intent:

“Governmental records” means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term “governmental records” includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term “governmental records” shall also include the term “public records.”

R.S.A. 91-A:1-a, III. Nonetheless, records of grand and petit juries are exempted from disclosure, R.S.A. 91-A:5, I, as is the master jury list as defined in R.S.A. 500-A:1, IV, R.S.A. 91-a:5, I-a.

4. Boston Globe's petition fails to take account of R.S.A. Chapter 91-A:5. By its own terms, however, the statute is dispositive, and Boston Globe does not argue that the statute is unconstitutional.

**B. Controlling New Hampshire Case Law Prohibit Dissemination of Juror Names and Addresses to the Media.**

**1. Overview of controlling precedent.**

1. The right of public access to court proceedings and records predates the adoption of both the federal and state constitutions. Associated Press v. State of New Hampshire, 153 N.H. 120, 125 (2005); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177 & n.6 (6th Cir. 1983). Contemporary examination of the issue began with Thomson v.

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Cash, 117 N.H. 653 (1977), when Governor Meldrim Thomson sought to prevent release of his deposition in a libel action he previously initiated against the defendants. Specifically relying on New Hampshire practice and common law rather than R.S.A. Chapter 91-A or the First Amendment, the court noted that “[t]he courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance.” Id. at 654. The court further recognized that some “special circumstances” are appropriately codified by court rule, such as non-disclosure of probation reports, sealing of marital affidavits, and protective orders for discovery issued for good cause shown. Id. Finally, the court placed the burden of proving the necessity for sealing otherwise open records on the party seeking non-disclosure. Id.

2. The court quickly recognized, however, a right of the press to gather information pursuant to part I, article 22 of the New Hampshire Constitution. Opinion of the Justices, 117 N.H. 386 (1977) (Senate may not compel a non-party reporter to reveal his sources at a proceeding to remove a government official); Keene Publishing Corp. v. Keene Dist. Court, 117 N.H. 959 (1977) (press may not be excluded from probable cause hearing absent application of Thomson balancing test). This right, however, is not unlimited. Keene Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710, 711 (1979) (mandating that proceedings cannot be closed to the media absent adequate findings of fact unless interested media voluntarily agree to restrictions as part of an informal conference with the court and the parties); Petition of Keene Sentinel, 136 N.H. 121, 128 (1992) (“We hold that under the

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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.”).

3. More recent cases have recognized, however, that inherent to the policies underlying public access is the fact that the right of access does not apply to every proceeding or to every record. Associated Press, 153 N.H. at 131. Thus, in Petition of Union Leader Corp., the court refused to allow access to the agendas and minutes of meetings of superior court judges. In reaching this decision, it first noted that public access to court records can be limited by both court rules and statutes. 147 N.H. 603, 605 (2001) (citing R.S.A. 169-B:35 (confidentiality of juvenile records); Petition of State of New Hampshire (Bowen Search Warrants), 146 N.H. 621 (2001)(qualified right of access to search warrants)). Said another way, overriding considerations and special circumstances can be created as a matter of policy by the legislature or the judiciary. Second, the court reasoned that agenda and minutes are not “court records” and held that the mandate of part I, article 8 of the New Hampshire Constitution (“the public's right of access to governmental proceedings and records shall not be unreasonably restricted”) does not apply to records unrelated to the superior court's adjudicatory function. Id. at 605-06.

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4. In Associated Press v. State of New Hampshire, the court further elaborated the limits to which the right of public access applies:

We decline to hold that every document filed in connection with a pending case is subject to the State constitutional right of access, and instead hold that the State constitutional right of access attaches only to those documents that are important and relevant to a determination made by the court in its adjudicatory function in connection with a proceeding to which the State constitutional right of access has attached.

153 N.H. at 134. Thus, there is no right of access (and no weighing of the Thomson factors) if a proceeding is not adjudicatory in nature or if the sought records are not part of the adjudicatory process. Historical precedent is relevant in making this determination. Id. at 131 (citing Petition of Union Leader Corp., 147 N.H. 603, and Petition of State of New Hampshire (Bowen Search Warrants), 146 N.H. 621).

**2. New Hampshire decisional law, as applied to the facts of this case, bars disclosure of juror names and addresses to the media.**

1. Disclosure is barred first because the jurors's names and addresses were not records associated with the process of adjudicating Mr. Zhukovskyy's case. Rather, like the agendas and minutes at issue in Petition of Union Leader Corp., these records were administrative in nature. The Clerk of Court collected and maintained them for the purposes of gathering a jury pool and ensuring compensation for the jurors's appearance at trial and expenses associated with travel to and from court. R.S.A. 500-A:15; In re Globe Newspaper Co., 920 F.2d 88, 94 (1st Cir. 1990)(noting that “juror names and addresses are collateral information

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kept by the court for its necessary administrative purposes, rather than being court proceedings or records of such proceedings”).

2. Disclosure is barred second because the legislature has long determined that juror records are not discoverable by the general public. R.S.A. 91-A:5, I and I-a. Said another way, this is a legislatively determined per se overriding consideration or special circumstance.

3. Disclosure is barred third because, assuming that the Thomson weighing test applies, it weighs against Boston Globe's request. This is not any jury trial. Nor is it even any high profile jury trial. It is a trial in which the highest elected official in the State and the highest appointed lawyer in the executive branch castigated the jury for its decisions. It is a case in which the media, including Boston Globe, has for three years published stories explicitly or implicitly demonizing Mr. Zhukovskyy. It is a case in which Boston Globe's own readers have viciously attacked the verdicts in writing. Allowing identification of the jurors under these circumstances exposes them to further attack – including potential physical violence – should they not be foresighted enough themselves to demand anonymity from Boston Globe's reporters. It is a case where the jurors may already feel victimized and will only feel further violated if a Boston Globe reporter comes to their homes late at night or to their workplace, where there anonymity will not be “respectfully” maintained.

4. Disclosure is barred fourth because the behavior of Governor Sununu and Attorney General Formella has already rendered impartial jury service less likely by future

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jurors. Further adverse press stories and public responses thereto pose real potential danger to a fair, just trial process with decisions made by impartial peers. This is a danger throughout New Hampshire, but no more so than Coos County – a community that is rural in nature and where a large number of the inhabitants know one another. NHACDL, its members, and their clients cannot further risk attacks on the constitutional system upon which they depend for justice.

**C. Boston Globe's Reliance on In re Globe Newspaper Co. is Misplaced.**

1. Boston Globe relies on In re Globe Newspaper Co., 920 F.2d 88, as persuasive authority for the relief it seeks. This reliance is misplaced.

2. First, as Boston Globe obliquely notes in its petition, the First Circuit Court of Appeals expressly declined to decide Globe Newspaper Co. by means of a First Amendment analysis. Rather, it confined its analysis to an analysis of the Jury Selection and Services Act of 1968, 28 U.S.C. § 1861, et seq (1982), and the District of Massachusetts Plan for Random Selection of Jurors, § 10(c), which plan was adopted pursuant to the Act. Id. at 91-92, 97. This analysis, which employed a statutory “interest of justice” standard, is totally irrelevant for purposes of construing New Hampshire common law and practice, New Hampshire statutes, and the New Hampshire Constitution.

3. Second, the Act construed required dissemination of juror information only if a district adopted a plan that provided for dissemination. Id. at 92. Accordingly, districts had

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the option of adopting local plans that declined to permit juror names to be made public at all. Id. Neither New Hampshire's legislature nor its courts have ever adopted a similar plan.

4. Third, as noted above, the First Circuit conceded that juror records are not “court records,” Id. at 94. While irrelevant for purposes of analyzing the implementation of a federal statute by a local district court, this distinction is crucial under controlling New Hampshire case law.

5. Fourth, the First Circuit relied upon the absence of any evidence or findings that there was some special risk of personal harm to the jurors. Id. at 91. By contrast, the Governor and the Attorney General have both criticized the jurors in this case personally. The media, including the petitioner, has also worked incessantly to incite ill feeling towards Mr. Zhukovskyy, thereby inflaming the public, as reader comments in Mr. Zhukovskyy's objection document. In the words of the First Circuit itself, “jurors summoned from the community to serve as participants in our democratic system of justice are entitled to safety, privacy and protection against harassment.” Id. at 95.

WHEREFORE, the New Hampshire Association of Criminal Defense Lawyers, by and through counsel, respectfully prays this Honorable Court:

A. Grant the New Hampshire Association of Criminal Defense Lawyers leave to appear an amicus curiae in the above-captioned matter;

B. Accept the foregoing memorandum of law in response to Boston Globe Media Partners, L.L.C.'s petition for access to juror names; and

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C. Grant such other relief as is just and proper.

Dated at City of Lebanon, County of Grafton, State of New Hampshire this 23rd  
day of September, 2022.

Respectfully submitted:

**/s/ Gary Apfel**

By:

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was forwarded to John G. McCormick, Esq., Scott D. Chase, Esq., Joshua L. Speicher, Esq., Steve Mirkin, Esq., Jay Duguay, Esq., William L. Chapman, Esq., and Jeremy D. Eggleton, Esq. this 23rd day of September, 2022.

**/s/ Gary Apfel**

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Gary Apfel, Esq.