

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

DEFENDANT’S OBJECTION TO PETITION BY BOSTON GLOBE MEDIA PARTNERS

NOW COMES the defendant, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and pursuant to the Court’s Order of August 24, 2022, respectfully OBJECTS to the Petition for Access to Juror Names submitted herein by Boston Globe Media Partners, LLC (“the Globe”), and states as follows:

1. This is a criminal case, between the State of New Hampshire and the accused, now acquitted, defendant, Volodymyr Zhukovskyy. The Globe is not a party hereto. As such, the Globe has no standing to file a motion or petition herein, and it has not moved to intervene.
2. Nor is it clear that the Globe has any right to intervene. While an “interested” person may file a pleading seeking to intervene in a civil action, NH Superior Court Civil Rule 15, there is no corresponding provision in the Rules of Criminal Procedure for intervention in a criminal proceeding.
3. The Globe might better pose the issue to the Court by filing a Writ against the Superior Court, or an original action in the Supreme Court, rather than seeking to intervene in a criminal proceeding. See In re Globe Newspaper Co., 920 F.2d 88, 90 (1st Cir. 1990).

4. Putting aside the procedural question, the defendant objects to the Petition on the merits as well.
5. The defendant does not contest the Globe's assertion that this was a highly publicized and controversial case. The Globe alone has published more than one hundred stories referencing some aspect of this case. The story was also extensively covered for the past three years by New Hampshire media outlets including WMUR-TV, the Manchester *Union Leader*, and NHPR, as well as other New England media outlets and national wire services.
6. Much of the coverage, including the Globe's, treated the Defendant's guilt as a forgone conclusion¹ and extensively covered the Jarheads Motorcycle Club in a sympathetic light, with favorable coverage given to commemorative motorcycle rides, fundraising for a memorial statue near the scene of the crash, and Robert Kraft's donation of \$100,000 to the families and survivors of the crash.
7. The Defendant asserts that the nature and extent of such coverage provides the very reason that the identification of jurors who served on this trial should not be released to the public.
8. The Globe acknowledges that there are no reported New Hampshire cases considering, let alone mandating, public access to the names of jurors who sat on a criminal case, Petition at ¶ 15. Instead, the Globe relies on a series of opinions dealing with issues of media access to records other than the identities of jurors, such as Thomson v. Cash, 117 NH 653 (1977) (deposition of sitting Governor in

¹ Extensive coverage was given by the Globe and other outlets to Mr. Zhukovskyy's driving history, admitted drug use, and the circumstances of his pending DUI in Connecticut; even in the subject pleading the Globe can't resist highlighting the Pulitzer Prize it received for its coverage of "the consequences caused by states failing to take reckless drivers off the road." Petition, ¶ 3.

libel suit filed by Governor against journalist); Petition of Keene Sentinel, 136 NH 121 (1992) (divorce records of candidate for Congress); In re Union Leader Corp., 147 NH 603 (2002) (minutes of Superior Court administrative meetings – denial of media access upheld on appeal); and State v. Kibby, 170 NH 255 (2017) (*pro se* letters sent to the Court by defendant seeking to have his counsel discharged).

9. The Globe further cites the Court to the thirty-year-old opinion in In re Globe Newspaper Co., 920 F.2d 88, 90 (1st Cir. 1990). In that case, the Globe sought juror identification information after a trial in U.S. District Court in Massachusetts involving “seven defendants, including a prominent Boston defense attorney, several other attorneys, a reputed fugitive Mafia member, and a member of the Bahamian parliament. The charges centered around an alleged conspiracy to conceal illegal drug profits from the Internal Revenue Service.” *Id.* at 90. In affirming the Globe’s right to such information, the First Circuit specifically relied on “the Jury Selection and Service 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 implements the Act in the District of Massachusetts.... the District of Massachusetts has chosen ... to allow juror names to be made public after summons and appearance, and thereafter to permit impoundment of juror names only upon a judge’s determination that the interests of justice so require.” *Id.* at 91-92.
10. The Globe does not cite any corresponding New Hampshire statutory provision, nor does it explain how the logic of the First Circuit in *In re Globe* applies to the question it seeks to present here.

11. Thus it is unclear whether jurors' identifying information is to be considered a "court record" for purposes of First Amendment and Part 1, Arts. 8 and 22 analysis. Mr. Zhukovskyy respectfully asserts that, as such information is of a different class than the records at issue in any of the reported New Hampshire cases comprising our current case law on the matter, and was not submitted or provided to the Court by, or otherwise relevant or applicable to the interest of, any party or representative of a party to the litigation, it is not.

12. If, for the sake of argument, such data is considered a "court record" for such purposes, then the Constitutional test has been stated as follows:

"In New Hampshire, the right of access may be overcome when a sufficiently compelling interest for nondisclosure is identified. In re Petition of State (Bowman Search Warrants), 146 N.H. 621, 625 (2001). 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."

Associated Press v. State, 153 NH 120, 129 (2005) (further citations omitted).

13. In this instance, Mr. Zhukovskyy respectfully submits that there is, in fact, a sufficiently compelling interest which outweighs the public's right of interest to that information, that being the safety of the jurors themselves.

14. As noted above, the public was subjected to a barrage of largely one-sided prejudicial publicity over the course of three years prior to the trial; to the extent that the defense's motion for individual *voir dire* of prospective jurors – extraordinary in a non-murder prosecution in New Hampshire – was assented to by the State and granted by the Court.

15. That the jury's verdicts of acquittal came as a surprise to the public is an understatement. While many who had followed the trial proceedings professed to understand the reasons for the verdict, many others expressed "shock, outrage, and anger." A sampling of public comments from the Globe's August 9, 2022 story "Mass. Truck Driver Is Acquitted In 2019 Motorcycle Crash That Killed Seven Motorcyclists" follows:

- "[That driver should've been] sentenced to prison for a long time, instead of being acquitted by a jury who clearly didn't know what the hell they were doing, or who just didn't give a damn. Other people lost their lives as a consequence of the pick-up truck driver's actions and behaviors, and the fact that this son of a b**tch (sic) is getting off scott-free is beyond disgusting, and a gross miscarriage of justice." – mplo
- "This acquittal is shameful on all accounts." – LindaDK
- "This is carrying NH motto 'live free or die' a little too far. Where did they find these twelve morons?" – tpowh13
- "2 1/2 hours means that the jury had made up its mind before going into the jury room. That time was spent venting about the trial." BeeJayDee
- "A miscarriage of justice, in my estimation (sic)." – mycs70
- "WHAT???????? ... There seems to be no accountability any more. HOW could a jury make that conclusion?????" – JoeLabChow
- "This confirms that a jury of your peers is a joke." – greyman
- "If the defendant had consumed cocaine, heroin and fentanyl that morning, a northern New Hampshire jury could probably sympathize with him." – EliotNessMobTrollHunter
- "Yikes. This guy is getting away with killing all those people." – yogasong44
- "Something smells.." – dontengageinschadenfreude

16. Moreover, as noted by the Globe in its Petition, ¶¶ 6 and 7, the Governor and Attorney General issued their own gratuitous insults to the jury. Gov. Sununu

declared the jury's verdict to be "not justice ... an absolute tragedy ... shock, outrage and anger ... [an] especially dark day." Attorney General Formella issued a public statement in which he clearly and unequivocally expressed his opinion that the jury had not honored its sworn obligation.

17. The Globe sees the foregoing as a reason for further journalistic investigation, ¶ 16, and supports its argument by reference to *In re Globe Newspaper Co.*, *supra*, and its interview of jurors in the 1991 trial of Pamela Smart. But the Globe fails to take into account the safety of jurors in the modern digital age.

18. Both the trials referenced by the Globe in its Petition occurred over thirty years ago, before the internet, before Facebook and other social media, and at a time when the word "troll" referred either to mythical creatures living under a bridge, or to a method of fishing. Now we live in a time when people who take public positions on a wide variety of issues are routinely subjected to having themselves or their families insulted or harassed, their businesses and social media accounts trolled, and even to receiving death threats.

19. 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's guilt. Having performed their responsibilities without fear or favor, they should be entitled to privacy. More than simply privacy, they deserve to go about their lives free from threats and harassment from people whipped into a frenzy by the extended media circus surrounding this case.

20. Additionally, jurors in future cases before the Coös Superior Court should be free of concern about post-trial harassment and threats, should they return a verdict that may be contrary to popular perception.

21. While the Globe asserts its intention to approach jurors respectfully and honor any requests for anonymity, the fact is that the Court, should it grant the Globe's requested relief, would be without means to enforce any such provisions, in the event any juror's identifying information is disclosed either purposely or inadvertently. It should be noted that NH Rule of Criminal Procedure 28 (b), governing post-trial communication with jurors, does not by its terms apply to representatives of the media who are neither attorneys, parties to the litigation, or agents or persons acting for attorneys or parties².

22. Mr. Zhukovskyy thus respectfully asserts that protection of the jurors who deliberated and returned a verdict herein from threats to their safety, public opprobrium, and online harassment, provides the "overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access" to their identities. *Associated Press v. State, supra*.

23. Toward the end of protecting the public's rights under the First Amendment, and Part I, Arts. 8 and 22, to hear jurors' insights as to relevant aspects of the trial, the defendant would not object to jurors being notified by the Court to the effect that:

a) Representatives of the Globe would be interested in speaking with them;

² Defense counsel's position in this matter is not inconsistent with any effort they may make at the appropriate time to seek to interview members of the jury for professional purposes as countenanced by Rule 28 (b); such efforts would be subject to potential sanction by the Court pursuant to Rule 28 (c) if inappropriately conducted, and of course would not be undertaken for release to the public.

- b) It is entirely up to each individual juror whether or not they speak with a Globe reporter, and whether they do so for attribution or anonymously;
and
- c) If a juror consents to being interviewed by a Globe reporter, he/she may initiate the process by contacting the Globe at a specified phone number or email address; otherwise, jurors' identities and contact information will not be disclosed to the Globe or any other media outlet by the Court.

24. The defense would note, however, that every Globe story concerning this case includes the email address of the reporter(s) who wrote it, and thus any juror who wished to be interviewed by the Globe after trial has already had the opportunity to contact such reporters if they so chose.

WHEREFORE, the accused respectfully prays the Court to DENY the Petition by Boston Globe Media Partners, LLC, and for such further relief as may be just.

Respectfully submitted,

/s/ Steve Mirkin
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 2nd day of September, 2022, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq. and Josh Speicher, Esq., Assistant Attorneys General, and to William L. Chapman, Esq., and Jeremy D. Eggleton, Esq., Orr & Reno, P.A.

/s/ Steve Mirkin
Steve Mirkin