

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 the
New Hampshire Association of Criminal Defense Lawyers**

Now Comes Boston Globe Media Partners, LLC., publisher of the Boston Globe (“Boston Globe”), and replies to the New Hampshire Association of Criminal Defense Lawyers’ (the “Association”) motion for leave and memorandum by representing:

1. To begin with as the Association stated at paragraph 5 of its filing, the Boston Globe takes no position on the relief it seeks in the prayer clause. That said, as is set forth herein, it believes the Associations legal arguments are not supported by New Hampshire law and fail to meet its 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).

2. The Association first relies on the state right-to-know law, RSA Ch. 91-A, to argue the Boston Globe is not entitled to obtain the names and addresses of the jurors. However, Part I, Article 37 of the state constitution prevents the legislative branch from interfering with the

judicial branch by enacting laws concerning access to court records. As the Supreme Court stated in *Associated Press v. State*, 153 N.H. 120, 143 (2005):

An essential power of the judiciary is the power to control its own proceedings. (Citation omitted). The doctrine of separation of powers is violated when one branch of government usurps an essential power of another. (Citation omitted).. Under RSA 458:15-b, as construed, *the court retains ultimate authority over access to court records*. Therefore, the power to control judicial proceedings continues to rest with the judiciary (emphasis added).

Accord, Opinion of the Justices, 141 N.H. 562, 569 (1997) (“This court has consistently recognized that ‘[a]s a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules.’ (citation omitted).” One such rule governs access to court records. *See Petition of Keene Sentinel*, 136 N.H. 121 (1992).

3. Relying principally on *Associated Press v. State*, 153 N.H. 120, (2005)(right of access applies only to “documents that are important and relevant to a determination made by a court in its adjudicatory function”) and *In re Union Leader Corp.*, 147 N.H. 603 (2002)(right of access “does not apply to records unrelated to the superior court’s adjudicatory function”), the Association next argues that a court record containing the names and addresses of the jurors who acquitted Defendant is not “associated with the process of adjudicating Mr. Zhukovskyy’s case.” Motion/Memorandum at page 9.

4. But the Association reads *In re Union Leader Corp.* too narrowly. Referring to minutes and agenda of meetings of judges of the superior court, the Supreme Court stated:

In sum, the documents sought are not court records. Rather, they are records of meetings of superior court judges concerning internal management and operation of the court that *do not directly relate or pertain to court proceedings or the superior court's adjudicatory functions*. The petitioner would have us interpret Part I, Article 8 so broadly as to mandate public access to all records related to any superior court activity, including its nonadjudicatory activities. We find no case from this or any jurisdiction, nor does petitioner identify any,

establishing that materials unrelated to the adjudicatory function of the courts have historically been open to public inspection or considered to be court records for purposes of public access (emphasis added).

147 N.H. at 605. Here, the list of jurors directly relates to a “court proceeding” and this Court’s “adjudicatory functions.” Jurors participated directly and extensively during Defendant’s trial: beginning with individual *voire dire*, going on the view, listening to and evaluating (i) the opening statements by counsel, (ii) the testimony of witnesses and exhibits offered by the State and Defendant, (iii) court rulings on evidentiary issues, (iv) closing arguments, and (v) jury instructions. Not only that, but jurors certainly formed impressions about the “court proceedings,” impressions that, if jurors are willing to speak with a Boston Globe reporter, will inform the public about this Court’s performance of its adjudicatory functions. *Cf. State v. Carter*, 167 N.H. 161, 169-170 (2014)([“T]he core adjudicatory functions of the judiciary [are] to resolve cases fairly and impartially and to protect the constitutional rights of all persons who come before the courts.”

5. Like Defendant, the Association speculates that “identification of the jurors under these circumstances exposes them to further attack – including potential physical violence – should they not ... demand anonymity from Boston Globe’s reporters.” Motion/Memorandum at page 10. Without evidence, the Association contention is just that and does not rise to the level of a sufficiently compelling state interest. *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”). The Association, here, has offered no evidence, empirical or otherwise. And the Association’s belief that “the behavior of Governor Sununu and Attorney General Formella has already rendered

impartial jury service less likely by future jurors,” Motion/Memorandum at 10-11, is without any evidentiary basis and falls well short of a compelling state interest.

6. Further, contrary to the Association’s argument in part C of its Motion/Memorandum, the Boston Globe did not rely on *In re Globe Newspaper Co.*, 920 F.2d 88 (1990). Rather, at paragraph 15 of the petition, the Globe relied on the First Circuit’s reasoning as being “instructive” on access to the jury list:

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 ... Furthermore, information about jurors, obtained from the jurors themselves or otherwise, serves to educate the public regarding the judicial system and can be important to public debate about its strengths, flaws and means to improve it.

920 F.2d at 91.

7. Finally, either not respecting or ignoring the Boston Globe’s factual statement of how it would approach jurors if the Court grants the petition, see Petition at ¶ 9, the Association asserts, “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.” Motion/Memorandum at page 5. It goes without saying that having filed the petition, the Boston Globe is subject to the Court’s jurisdiction and must abide by conditions the Court imposes if, upon receiving juror names and addresses, a Globe reporter seeks to interview jurors.

WHEREFOR the Boston Globe respectfully requests the Court to not credit the Association’s arguments and grant its petition and such other relief as may be necessary and proper.

Respectfully submitted by its attorneys,

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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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