

THE STATE OF NEW HAMPSHIRE

COOS, SS.

SUPERIOR COURT

Case No. 214-2019-CR-00078

State of New Hampshire

v.

Volodymyr Zhukovskyy

BOSTON GLOBE MEDIA PARTNERS, LLC’S HEARING MEMORANDUM

Now Comes Boston Globe Media Partners, LLC., publisher of the Boston Globe (“Boston Globe”), and submits this memorandum in support of its Petition for Access to Juror Names (“Petition”) in this case.

In its October 19, 2022 Order, the Court stated it “must balance the Boston Globe’s interest in accessing the jurors’ names and addresses with the jurors’ interest in maintaining confidentiality, particularly in light of the media attention their verdict received.” Order at 2. The Court cited *State v. Kibby*, 170 N.H. 255, 258-259 ((2017), noting it discussed “balancing [the] competing interests in disclosing court documents.” *Id.* In *Kibby*, the Supreme Court restated *long-standing* New Hampshire precedent on disclosure of court records:¹

“The courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance.” Petition of Keene Sentinel, 136 N.H. 121, 126 ... “Such access is critical to ensure that court proceedings are conducted fairly and impartially, and that the judicial process is open and accountable.” Petition of Union Leader Corp., 147 N.H. 603, 604

“[T]here 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

¹ The opening quotation attributable to *Petition of Keene Sentinel* was first stated by the Court in *Thomson v. Cash*, 117 N.H. 653 (1977).

public's right of access to those records.” Petition of Keene Sentinel, 136 N.H. at 128

We require trial courts to employ the following process to balance the public's interest in access to court documents against any competing interest. First, “the party opposing disclosure of the document [must] demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document.” Associated Press v. State of N.H., 153 N.H. 120, 136, 888 A.2d 1236 (2005). Second, “the court [must] determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved.” Id.

Kibby, 170 N.H. at 258-259. Applying the principles set forth in *Kibby*, the burden is on Amicus Counsel, the Defendant and the Association of Criminal Defense Attorneys to “demonstrate that there is a sufficiently compelling reason” to justify nondisclosure of the jury list. Assuming the Court finds they have met their burden, it must find there is “no reasonable alternative to nondisclosure.” Here, as set forth in the Petition, there is a reasonable alternative.

The Court also cited *In re Disclosure of Juror Names & Addresses*, 552 N.W. 798, 808-809 (Mich. Ct. App. 1999)(hereinafter “*Disclosure*”), a “high profile, serial rape and murder trial,” for the need to balance “the media’s interest in access to identity of jurors with jurors’ safety and privacy interests in criminal cases.” Opinion at 2.² In that case, the court of appeals discussed four points that are relevant here. First, to the extent Amicus Counsel argues that the list of juror names and addresses is not a court record, the court noted cases holding otherwise:

Most federal and state courts that have addressed this issue have articulated a limited or qualified right to such access, premised on the *Press-Enterprise* rationale that openness in all aspects of our justice system promotes fairness to litigants and promotes public faith in our jurisprudence. Indeed, such openness has traditionally been the hallmark of the Anglo-American system of justice, serving as an indispensable guarantee against a closed system's potential for arbitrariness and corruption.

² Amicus Counsel stated that *Disclosure* is a “sound opinion,” adding that this Court “could apply the rule articulated” in that case. See Amicus Counsel Brief at ¶¶26-27. The Boston Globe agrees, as the discussion that follows indicates.

Disclosure, 592 N.W. 2d at 799 (footnote omitted). Those cases mirror New Hampshire law. In *Associated Press v. State*, 153 N.H. 120, 128 (2005), our court stated: “The explicit incorporation of the right of access to governmental *documents* into the State Constitution [referring to Part I, Article 8] provides greater textual support to the constitutional right of access to court records than does the First Amendment” (emphasis original).” *Accord, In re Union Leader Corp.*, 147 N.H. 604, 605 (2002)(A “court record ... pertain[s] to court proceedings or the superior court's adjudicatory functions”). The list of the jurors who sat on and decided this case - a court proceeding – meets that definition.

Second, it held:

[T]he press has a *qualified* right of access to names and addresses of jurors postverdict. We qualify this right of access by also holding that trial courts have discretion to impose appropriate restrictions on the manner and time of disclosure, and in some circumstances, perhaps, to refuse disclosure, in order to accommodate all the interests of justice, where safety concerns of jurors are found to be legitimate concerns.

Id. at 799 (italics original).

Third, jurors in this case expressed to Amicus Counsel that they did not want “their personal information or identities released to any source based in part on concerns for their personal safety.” Amicus Counsel Brief at ¶10. The *Disclosure* court also spoke to this concern:

We believe jurors' own expressions of safety concerns are entitled to serious consideration by the trial court. On the other hand, the media's right of access would be unduly and unreasonably limited if the trial court could refuse to disclose jurors' names merely because jurors subjectively feared harassment without any realistic basis. We therefore hold that the trial court cannot deny media access to jurors' names and addresses without first making a determination that concerns for jurors' safety are legitimate and reasonable. The trial court's findings of safety concerns and articulation of the reasons will also allow for appropriate appellate review.

592 N.W. 2d at 629-630.

Fourth, the court addressed the jurors' concern for their personal privacy. It stated:

To a lesser extent, we recognize jurors' interest in their privacy. Privacy concerns alone, unaccompanied by safety concerns, are not sufficient to justify total denial of media access to jurors' names. To use the trial court's phrase, jurors are "citizen-soldiers" charged with carrying out an important public responsibility. As with any other public officers, jurors sometimes must bear certain irritations in carrying out their duties. However, privacy concerns may justify a lesser restriction, such as a brief waiting period or an order prohibiting reporters from repeatedly attempting to question jurors who have already refused an interview.

Id. at 530.

In the end, the court of appeals held:

We therefore hold that the press has a qualified right of postverdict access to juror names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court's order.⁹

Id. at 530.³

As already mentioned, the Court, in its October 19, 2022 Order, referred to the Boston Globe's interest in accessing the jurors' names and addresses.⁴ That interest is to serve the public interest: to give the public an insight about the trial, the judicial system and post-trial comments about the jury's verdict from those jurors who are willing to speak with its reporter. In the Introduction to the Petition, the Boston Globe stated:

Jurors, having an upfront seat in the courtroom, are in a *unique* position to observe and evaluate what goes on during a trial, from the demeanor and content of testifying witnesses to the way the judge presides over the trial. See Exhibit 1, "*Jurors say tapes a key to their decision: Verdict in the Smart case*," Boston Globe, March 23, 1991. Their insights about the trial lie "at the core of First Amendment values." *Nebraska Press Ass'n*, 427 U.S. at 587. As the United States Court of Appeals for the First Circuit stated: Information "obtained from jurors ...

³ In footnote 9 the *Disclosure* court stated: "For example, a trial court might act to protect juror privacy by precluding jurors from revealing the statements other jurors made during deliberation Such safeguards protect the integrity of the jury system by building jurors' confidence that their comments during deliberation will not become public knowledge without the juror's consent."

⁴ So there is no confusion or misunderstanding, although Amicus Counsel cited two Superior Court Rules and one Administrative Order protecting juror questionnaires, see Amicus Counsel Brief at ¶15, the Boston Globe seeks *only* juror names and addresses.

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. *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990).

The jury's verdict in this case generated considerable comment and some controversy. The Boston Globe seeks the names of the jurors so those willing to speak with its reporter can inform the public about what went on in the courtroom that led to its outcome, not to mention other observations they have about the criminal justice system.

Petition at 2. Those are the interests to be balanced against the jurors' concerns for their safety and privacy. See Amicus Counsel Brief at ¶¶10 ("personal safety"), 30 (seven reasons "to forbid contact between the press and jurors"), 31-33 (discussing the "highly inappropriate" comments of Governor Chris Sununu to which "most [jurors] expressed concern for their safety"), and "highly inappropriate statement" of Attorney General John Formella that "puts the jurors at risk and on the defensive"), 36 ("One juror ... carried a fire arm ... for fear of his personal safety"); 37 (one juror "felt so threatened by social media comments"); 38 (one juror lived in a small town and "was concerned about harassment" if her name became public); 39 ("irritated by Governor Sununu's comments," one juror didn't tell the person sitting next to her that she had been a juror "for concern about her own safety"); and 45 (one juror observed that disclosure "will likely have ... a chilling effect on the ability of the Court to empanel jurors in other cases").

Given the jurors' concerns for their safety, Amicus Counsel expressed "grave concern" that disclosure of their names "would have on the integrity of the justice system, specifically whether future juries would be less likely to speak freely during deliberations and in rendering a verdict," and the effect that might have on "the accused's Sixth Amendment right to a fair trial." See Amicus Counsel Brief at ¶43. The *Disclosure* court expressed the same concern, but it, nevertheless, stated that "trial courts need some

discretion to ameliorate jurors' legitimate fears *by imposing suitable restrictions on media access to juror names and addresses*" (emphasis added)." See Amicus Counsel Brief at ¶42, citing *Disclosure*, 592 N.W. 2d at 808.

Anticipating that the jurors in this case might have concerns about safety and privacy in view of the verdict they rendered, the Boston Globe in paragraph 9 of the Petition stated it would honor any juror who requested anonymity. Thus, it proposes as "suitable restrictions" in this case that the Court release the juror names and addresses to it on condition that its reporter, Laura Crimaldi,⁵ explain to each juror she is able to meet:

1. that the juror does not have to speak to her;
2. that if the juror decides to speak with her, the juror would have the right to stop the conversation at any time or refuse to answer any question;
3. that the juror has the right to be an anonymous source for any article the Boston Globe writes about the Zhukovskyy case; and
4. should the Boston Globe not honor the juror's condition of anonymity by naming the juror or providing identifying information about the juror, the Boston Globe could be held in contempt of court.

These conditions would squarely respond to the "grave concerns" stated by Amicus Counsel.

Even if jurors who decide to speak with Ms. Crimaldi wish to remain anonymous, their impressions about the trial, the case the State presented, the effect of comments by Governor Sununu and Attorney General Formella, among other topics, would be instructive and serve the public interest. 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

⁵ Ms. Crimaldi has been covering the news in New England since 2001. In 2021, she shared a Pulitzer Prize in investigative reporting for the Globe's series, "Blind Spot," which included articles about Volodymyr Zhukovskyy and the accident giving rise to the criminal charges against him.

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.

The First Circuit agrees: “Furthermore, information about jurors obtained from the jurors themselves ... 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.” *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990).

To give it the opportunity to provide the public with more information about the *Zhukovskyy* case and the criminal justice system in New Hampshire, including the effect of comments by public officials on jurors’ willingness to serve in criminal trials, the Boston Globe respectfully requests the Court to grant its Petition for Access to Juror Names, subject to the suitable restrictions it has proposed or other restrictions the Court deems reasonable.

Respectfully submitted,

BOSTON GLOBE MEDIA PARTNERS, LLC

By its Attorneys,

ORR & RENO, P.A.

Date: February 6, 2023

By: /s/ William L. Chapman
William L. Chapman, Esq. (Bar No. 397)
45 South Main Street
Concord, NH 03301
(603) 224-2381
wchapman@orr-reno.com

CERTIFICATE OF SERVICE

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

Dated: February 6, 2023

/s/ William L. Chapman
William L. Chapman

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