

**Waystack**  
**Frizzell**  
TRIAL LAWYERS  
[www.waystackfrizzell.com](http://www.waystackfrizzell.com)

133 Main Street - P.O. Box 507  
Lancaster, NH 03584  
Tel. (603) 788-4244 - Fax (603) 788-4255

PHILIP R. WAYSTACK  
JONATHAN S. FRIZZELL  
REBECCA A. WITMON

February 2, 2023

NH Superior Court, Coos County  
Viktoriya A. Kovalenko, Clerk  
55 School Street, Suite 301  
Lancaster, NH 03584

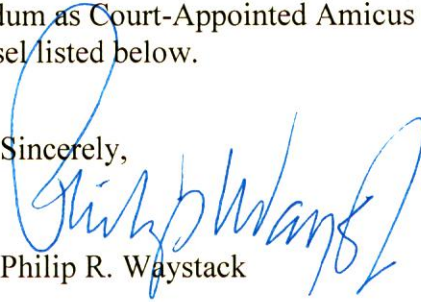
RECEIVED  
COOS SUPERIOR COURT  
2023 FEB - 2 P 1:21

**Re: State of New Hampshire vs. Volodymyr Zhukovskyy**  
**Case Number: 214-2019-CR-00078**

Dear Clerk Kovalenko:

I am enclosing my hearing memorandum as Court-Appointed Amicus Counsel. I certify that I have mailed this document to the counsel listed below.

Sincerely,

  
Philip R. Waystack

PRW/sib

Enclosure

Cc: John G. McCormick, Esquire  
Scott D. Chase, Esquire  
Joshua L. Speicher, Esquire  
William L. Chapman, Esquire  
Jeremy D. Eggleton, Esquire  
Steve Mirkin, Esquire  
Jay Duguay, Esquire  
Gary Apfel, Esquire

THE STATE OF NEW HAMPSHIRE

COOS, SS

SUPERIOR COURT

CASE NO.: 214-2019-CR-00078

STATE OF NEW HAMPSHIRE

v.

VOLODYMYR ZHUKOVSKYY

RECEIVED  
COOS SUPERIOR COURT  
2023 FEB -2 P 1:21

**BRIEF OF COURT-APPOINTED JUROR AMICUS COUNSEL  
RE: BOSTON GLOBE'S PETITION FOR ACCESS TO JUROR NAMES**

NOW COMES Philip R. Waystack, Esquire, Court-Appointed Amicus Counsel in the above-referenced case and submits the following brief pursuant to the Court's October 19, 2022 order:

**PROCEDURAL BACKGROUND**

1. On October 18, 2019, the defendant, Volodymyr Zhukovskyy, was indicted on seven counts of Negligent Homicide, seven counts of Negligent Homicide – DUI, seven counts of Manslaughter – Reckless, one count of Aggravated Driving While Intoxicated, and one count of Reckless Conduct, all indictments stemming from a motor vehicle collision between Mr. Zhukovskyy and seven motorcyclists in Randolph, New Hampshire on June 21, 2019.
2. On August 3, 2022, after the prosecution's presentation of its case against Mr. Zhukovskyy, the Court dismissed for lack of sufficient evidence the Aggravated Driving While Intoxicated count and all seven counts of Negligent Homicide – DUI.
3. After a twelve-day trial, the jury deliberated, and thereafter announced its verdict of "not guilty" on all remaining charges.

4. On the same day that the jury rendered its verdict, the following statements were issued from arguably two of the most powerful public figures in the state of New

Hampshire:

New Hampshire Governor, Christopher T. Sununu—“The Fallen Seven did not receive justice today, and that is an absolute tragedy. I share in the shock, outrage, and anger that so many have expressed in the three years since the seven members of the Jarheads Motorcycle Club were taken from us. My heart goes out to their families, friends, and loved ones on this especially dark day.”

New Hampshire Attorney General, John Formella—“Our hearts go out to the victims and their families. Our trial team did an excellent job and we firmly believe that the State proved its case beyond a reasonable doubt. Mr. Zhukovskyy should have been found guilty of the charges in this case and held responsible for causing seven deaths and numerous injuries. We thank the Court and the jurors for their service, and while we are extremely disappointed, we respect the verdict and our system of justice.”

5. On August 22, 2022, the Boston Globe Media Partners, LLC, publisher of the Boston Globe (the “Boston Globe”) filed a Petition for Access to Juror Names, asking the Court “to give it access to the juror list in this case by (i) providing the names and addresses in an order ruling on this petition, or (ii) making the names and addresses available to the Boston Globe or its counsel upon their going to the courthouse.” (Index #444 ¶ 17.)

6. The defendant objected to the Boston Globe’s Petition (Index #448), to which objection the Boston Globe filed a reply.

7. In addition, the New Hampshire Association of Criminal Defense Lawyers (“NHACDL”) filed a Motion for Leave to Appear as Amicus Counsel and Memorandum of Law in Response to Boston Globe’s Petition for Access to Juror Names. (Index #453.) The NHACDL’s Motion for Leave to Appear as Amicus Counsel was granted by the Court without objection.

8. On October 19, 2022, the Court issued an order appointing undersigned counsel, Philip R. Waystack, Jr., Esquire, as amicus counsel to represent the interest of the seventeen jurors who sat on the Zhukovskyy case. The Court instructed court-appointed Amicus Counsel to “contact each juror and ascertain each juror’s position with respect to the relief requested and the juror’s reasons therefor.” 10/19/2022 Court Order at 2. The Court further instructed court-appointed Amicus Counsel to file a report on his discussions with the jurors by November 21, 2022, and “a hearing memorandum or brief on behalf of the jurors in which he articulates and advocates for their interests” at least five business days prior to the hearing.” *Id.* at 3.

9. The Boston Globe filed a Motion to Reconsider the Court’s October 19, 2022, which the Court denied.

10. After speaking with every juror in accordance with the Court’s October 19, 2022 Order, on November 18, 2022, undersigned counsel filed his report with the Court, expressing the unanimous position of the seventeen jurors: all jurors expressed that they do not want their personal information or identities released to any source based in part on concerns for their personal safety. The jurors expressed to undersigned counsel that they followed the instructions given to them by the Court and reached a fair and just verdict.

11. The Court scheduled a hearing on the Boston Globe’s Petition for Access to Juror Names for February 9, 2023.

### **LEGAL ARGUMENT**

12. As the Court observed in its October 19, 2022 Order, this case presents a balancing test between the Boston Globe’s interest in accessing the jurors’ names and

addresses and the jurors' interest in maintaining confidentiality particularly in light of the media attention their verdict received. In addition, the Court considers any effect that allowing access to juror's names and addresses may have on the integrity of the justice system. See 10/29/2022 Court Order at 2; In re Disclosure of Juror Names & Addresses, 592 N.W.2d 798, 808–09 (Mich. Ct. App. 1999) (balancing the media's interest in access to identity of jurors with juror's safety and privacy interest in criminal cases). What makes this balancing test more challenging is the paucity of state law precedent on this issue.

13. Presumably because of the lack of New Hampshire case law on point, the Boston Globe focuses its Petition on Part I, Article 8 of the New Hampshire Constitution and a few specific cases not directly on point—two New Hampshire Supreme Court decisions concerning public access to court records (Thomson v. Cash, 117 N.H. 653 (1977) and State v. Kibby, 170 N.H. 255 (2017)) and two court cases from the United States Court of Appeals for the First Circuit (In re Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990) and United States v. Chin, 913 F.3d 251 (1st Cir. 2019)).

14. The problem with the Boston Globe's reliance on the above cases is two-fold.

15. First, the New Hampshire Supreme Court cases relate to public access to court records. “The courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance.” Kibby, 170 N.H. at 258. Juror names and addresses, however, have never been considered “court records” subject to review in New Hampshire. In fact, N.H. R. Crim. P. 22(b) provides that only parties to the case or their attorneys or non-attorney representatives may have access to jury questionnaires and that “[n]one of those persons shall reveal any information

contained in the questionnaires to any person except as may be necessary in connection with the prosecution or defense of the case or cases for which access was granted.” See also N.H. Super. Ct. R. 38(a) (providing same). In addition, the New Hampshire Superior Court has issued an Administrative Order on the dissemination of the very information sought in the Boston Globe’s Petition. Procedures Relative to Juror Questionnaire Dissemination, N.H. Super. Ct. Admin Order 2016-06 ¶ 5 (May 4, 2016) (Order, Nadeau, J.) (“Juror questionnaires are confidential material.”). Because juror questionnaires, and the information held within, are not considered court records subject to review by or dissemination to the public, this is not a simple question of whether the public has a right to court records, but rather whether the public should have access to confidential juror information under these specific circumstances.

16. Second, the two cases the Boston Globe cites from the United States Court of Appeals for the First Circuit were both appeals from the District of Massachusetts and both were regarding specific federal law on dissemination of juror information, specifically 28 U.S.C. § 1863 and Section 10(c) of the District of Massachusetts Plan for Random Selection of Jurors (“Jury Plan”), which the District of Massachusetts had adopted pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–74 (1982). In Chin and In re Globe Newspaper, the Court interpreted Section 10(c) as requiring the Court to make juror names and addresses available to the public unless the Court finds exceptional circumstances peculiar to the case justifying nondisclosure. Chin, 913 F.3d at 259; In re Globe Newspaper, 920 F.2d at 97–98.

17. Although the First Circuit Court of Appeals cases are not binding on New Hampshire state courts because they are interpretations of federal law, the Court does set

forth at least some test that has been used when trying to determine whether to keep juror information confidential or release it to the public. This test, however, begins with the presumption that juror information is public, which is the complete opposite presumption from that in New Hampshire—that juror information is confidential.

18. Juror information is kept confidential in the State of New Hampshire to protect the integrity of the justice system by assuring jurors' rights to safety and privacy and assuring the accused's Sixth Amendment right to a fair trial.

19. The media's right to investigate and report on public proceedings involved in a trial pursuant to the First Amendment to the United States Constitution is not absolute. United States v. Brown, 250 F.3d 907, 914 (5th Cir. 2001). "It does not 'guarantee journalists access to sources of information not available to the public generally.'" Id. (quoting In re Express News Corp., 695 F.2d 807, 809 (5th Cir. 1982)). "When representatives of the communications media attend trial they have no greater rights than other members of the public." United States v. Gurney, 558 F.2d 1202, 1208 n.9 (5th Cir. 1977). "[A] trial court may refuse to allow the media to inspect documents not a matter of public records, including jurors' names and addresses." Brown, 250 F.3d at 914.

20. Here, in the State of New Hampshire, juror names and addresses are not a matter of public record and, therefore, the Court may refuse to allow the Boston Globe access to that information.

21. In addition, any right that the public may have to access to juror information is a qualified right that must be assessed on a case-by-case basis, considering not only the public policy of openness but also considering the policy of protecting the integrity of the









inappropriately castigate the jury, and by implication, the Court is harmful. It undermines public confidence in the integrity of the Courts and unnecessarily puts the jurors at risk and on the defensive.

34. As with the statements of Governor Sununu, Attorney General Formella's comments were widely covered in the media and circulated in social media. As Attorney General, he occupies a highly, visible and powerful position. His criticism of the jury verdict created the potential for danger to the jurors from the unknown numbers of citizens who may have agreed with his public comments and felt anger that jurors and the Court did not hold the defendant responsible.

35. Print media coverage, including online media reports of the trial, was extensive and recurring. Electronic versions of various newspapers, including the Boston Globe, allow and seem to encourage reader comments. Some, if not many of the reader comments to the coverage of the jury verdict were tremendously negative. Some expressed disbelief, and even anger about the verdict. See Def's Obj. to Boston Globe's Pet. ¶ 15 (providing an extensive bulleted list of negative public comments against the jury from the Boston Globe's August 9, 2022 story, "Mass. Truck Driver is Acquitted in 2019 Motorcycle Crash that killed Seven Motorcyclists").

36. Several of the jurors mentioned both the news coverage and the negative comments. They were aware of the negative publicity and did not feel that it was their job to have to respond and justify their verdict to people who would question them. One juror relayed that he carried a firearm with him after his jury service ended for fear of his personal safety. He also stated that if his name was to be released that he would never serve on a jury again. Zhukovskyy was the second trial in which he served as a juror.

37. In a similar vein, social media was also active with negative sentiment about the result of the jury verdict. Although court-appointed Amicus Counsel did not examine how many jurors regularly consume social media, one particular juror offered that she was forced to shut down her social media outlets for a time. She felt so threatened by social media comments that it was affecting her ability to go about her daily life.

38. Another juror is a resident in a very small town. She stated that she was concerned about harassment, both at work and around town if her name was mentioned in public as a member of the Zhukovskyy jury. So, when she went to work, she did not speak much with her coworkers to avoid having to answer questions of co-workers about the verdict. She also stated that she kept a low profile and minimized her exposure around town shopping and running errands. This juror's experience has been shared by many jurors who have served on cases where there has been significant public exposure.

39. It is difficult to separate any juror's interest in maintaining a low public profile following jury service in a visible case from what has happened after the Zhukovskyy verdict. For example, one juror stated that she was waiting in a bus station in Manchester, New Hampshire when someone sitting in the waiting room next to her asked her if she had heard about the verdict in Zhukovskyy, began talking about Governor Sununu's remarks, and questioned how the jury could reach such a verdict. The juror stated that she was irritated by the Governor's comments and did not tell the person that she had served on the jury for concern about her own safety.

40. It appears that inappropriate public comments by high state officials questioning whether the jury verdict was just and expressing anger reverberated in public, the print

and broadcast media, and through social media. The public statements also appear to have influenced comments in electronic print media by readers.

41. We live in an age where the internet and social media allows and even promotes instant and wide distribution of newsworthy matters. It also often encourages subjective and often loud commentary about such matters. There is significant evidence that such factors have all occurred in the prosecution of this case and aftermath of the jury verdict. To the Amicus Counsel, these factors do raise bona fide questions about potential safety concerns for the jurors if their names and home addresses were released into the public domain, even if released with restrictions.<sup>2</sup>

42. As stated so eloquently by the Michigan Appellate Court:

Uninhibited and frank jury deliberations are essential to our system of justice. That frankness would be jeopardized if jurors refrained from speaking freely because they fear for their safety should their names and comments become public knowledge. To ensure conscientious and thorough deliberations, trial courts need some discretion to ameliorate jurors' legitimate fears by imposing suitable restrictions on media access to jurors' names and addresses.

In re Disclosure of Juror Names and Addresses, 592 N.W.2d at 808.

43. Here, the jurors have spoken, and many, knowing their names and addresses may be released to the media, fear for their safety. Not only is this particular jury's safety a concern, but also of grave concern is the effect that the disclosure of jurors' names and addresses under these particular circumstances would have on the integrity of the justice system. If jurors know that they will not be protected when their safety is at risk after

---

<sup>2</sup> It should be noted that although the Boston Globe has pleaded for restrictions so that it may have access to jurors' names and addresses, such restrictions on any other media outlet who wants to fly on the Boston Globe's shirttail would likely be struck down. "[W]hile a court may broadly proscribe attorney and party contact with former jurors, it does not have the same freedom to restrict press interviews with former jurors." Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986).

serving on a jury, they will be less likely to speak freely during deliberations and in rendering a verdict. This in turn affects the accused's Sixth Amendment right to a fair trial.

44. While the public's right to know what transpires in the courtroom is a legitimately protected constitutional right (U.S. CONST. amend. I; N.H. CONST. part I, arts. 8, 22), it is not absolute. United States v. Brown, 250 F.3d at 914. Defendants' and litigants' right to a fair trial and for a jury of his/her peers is likewise a legitimately protected constitutional right. U.S. CONST. amend VI; N.H. CONST. part I, arts. 15, 20.

45. Amicus counsel argues that the juror names and addresses should not be released to the Boston Globe or any other person or entity. The release of personal identifying information of jurors will likely have, as one juror observed, a chilling effect on the ability of the Court to empanel jurors in other cases. Release of jurors' names and addresses will also likely place jurors' safety in jeopardy.

46. In balancing the competing constitutional rights of public access of court information and the right to a jury trial, one right must be subordinate under the exceptional and highly unusual circumstances in this matter. As the Michigan Appellate Court observed in In re Disclosure of Juror Names and Addresses: "No right ranks higher than the right of the accused to a fair trial." 592 N.W.2d at 802.

47. For the foregoing reasons, Amicus Counsel respectfully requests that this Honorable Court deny the Boston Globe's Petition for Access to Juror Names and Addresses.

Respectfully submitted,  
Philip R. Waystack,  
Court-Appointed Juror Amicus Counsel

Dated: February 2, 2023

/s/Philip R. Waystack  
Philip R. Waystack, Esq.  
N.H. Bar No. 2672  
133 Main Street, PO Box 507  
Lancaster, NH 03584  
(603) 788-4244  
phil@waystackfrizzell.com

#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief was on this day delivered to all parties of record.

Dated: February 2, 2023

/s/Philip R. Waystack  
Philip R. Waystack