

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

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RULE 7 NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court or circuit court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving a collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A other than an appeal from the first final order. (An appeal from the first final order issued in a domestic relations matter filed under RSA chapters 457 to 461-A should be filed on this form.)

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

**State of New Hampshire v. Volodymyr Zhukovskyy
214-2019-CR-00078**

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

**Coos County Superior Court
Hon. Peter H. Bornstein**

3A. APPEALING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

**Boston Globe Media Partners, LLC
1 Exchange Place
Boston, MA 02109**

E-Mail address: _____

Telephone number: _____

3B. APPEALING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

**William L. Chapman, Esq., NH Bar #397
Jeremy D. Eggleton, Esq., NH Bar #18170**

**Orr & Reno, P.A., 45 S. Main Street,
P.O. Box 3550, Concord, NH 03302-3550**

jeggleton@orr-reno.com

E-Mail address: **wchapman@orr-reno.com**

Telephone number: **(603) 224-2381 ext 1107**

4A. OPPOSING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

**Volodymyr Zhukovskyy
90 New Bridge Street
W. Springfield, MA 01089**

E-Mail address: _____

Telephone number: _____

4B. OPPOSING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

**Jay Q. Duguay, Esq., NH Bar #20347
New Hampshire Public Defender Office
134 Main Street, 3rd Fl.
Littleton, NH 03561**

E-Mail address: **jduguay@nhpd.org**

Telephone number: **(603) 444-1185 ext**

RULE 7 NOTICE OF MANDATORY APPEAL

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Seventeen Jurors - Philip Waystack, Jr., Amicus Counsel
Office of the Attorney General - Joshua Speicher, Esq.
NH Public Defender Office - Steve Mirkin, Esq.
NH Assoc. of Criminal Defense Lawyers - Gary Apfel, Esq.
Coos County Attorney - John McCormick, Esq.
Office of the Attorney General - Scott Chase, Esq.

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH OR INCLUDE COPY OF NOTICE AND DECISION.

04/04/2023

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH OR INCLUDE COPY OF NOTICE AND DECISION.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. APPELLATE DEFENDER REQUESTED?

YES or NO: No

IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND SUBMIT A CURRENT REQUEST FOR A LAWYER FORM (FINANCIAL STATEMENT). SEE SUPREME COURT RULE 32(4).

9. IS ANY PART OF CASE CONFIDENTIAL?

YES or NO: Yes

IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

See attached 11/22/2022 correspondence and 11/22/2022 Order

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?

YES or NO: No

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL? SEE SUPREME COURT RULE 15, COMMENT.

YES or NO: Yes

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

RULE 7 NOTICE OF MANDATORY APPEAL

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH.

See attached sheet.

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. To the extent that an unpreserved issue is raised as plain error, I hereby certify that I have specifically identified that issue as plain error in section 13.

/s/ William L. Chapman
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and with Rule 18 of the Supplemental Rules of the Supreme Court.

04/27/2023
Date

/s/ William L. Chapman
Appealing Party or Counsel

RULE 7 NOTICE OF MANDATORY APPEAL

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court Rule 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. Parties will be provided with an electronic copy of the transcript in PDF-A format. A paper copy of the transcript may also be prepared for the court.

| PROCEEDINGS TO BE TRANSCRIBED | | | | | |
|---|--|--------------------|---|---|------------------|
| PROCEEDING DATE (List each day separately, e.g. 5/1/11; 5/2/11; 6/30/11) | TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.) | NAME OF JUDGE | LENGTH OF PROCEEDING (in .5 hour segments, e.g., 1.5 hours, 8 hours) | RATE (standard rate unless ordered by Supreme Court) | DEPOSIT |
| 02/09/2023 | Hearing on Pet. for Access | Peter H. Bornstein | 2 hours | X \$137.50 | \$ 275.00 |
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| | | | | TOTAL DEPOSIT | \$ 275.00 |

| PROCEEDINGS PREVIOUSLY TRANSCRIBED | | | | | |
|--|--|---------------|---------------------|---|-------------------------------|
| PROCEEDING DATE (List date of each transcript volume) | TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.) | NAME OF JUDGE | NAME OF TRANSCRIBER | DO ALL PARTIES HAVE COPY (YES OR NO) | DEPOSIT FOR ADDITIONAL COPIES |
| | | | | | TBD |
| | | | | | TBD |
| | | | | | TBD |

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you will be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

Attachment re:
Paragraph 9
(Confidentiality)

Chapman, William L.

From: Lana Lesperance <LLesperance@courts.state.nh.us>
Sent: Tuesday, November 22, 2022 12:51 PM
To: Chapman, William L.
Cc: Eggleton, Jeremy D.; phil@waystackfrizzell.com; annie.m.gagne@doj.nh.gov; Susan Warner; McFall, Mary E.; Superior Courts
Subject: RE: State v. Volodymyr Zhukovskyy, Case N. 214-2019-CR-00078 [OR-IMANAGE.FID524567]

Thank you. I will bring this to Judge Bornstein's attention to see if anything further needs to be done.

From: Chapman, William L. <WChapman@orr-reno.com>
Sent: Tuesday, November 22, 2022 12:26 PM
To: Lana Lesperance <LLesperance@courts.state.nh.us>
Cc: Eggleton, Jeremy D. <JEggleton@orr-reno.com>; phil@waystackfrizzell.com; annie.m.gagne@doj.nh.gov; Susan Warner <SWarner@courts.state.nh.us>; McFall, Mary E. <MMcFall@orr-reno.com>
Subject: State v. Volodymyr Zhukovskyy, Case N. 214-2019-CR-00078 [OR-IMANAGE.FID524567]

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Coos County Clerk's Office-

I am following up my call this morning with Lana in your office.

This morning I along with counsel who are copied on this email received a copy of Juror Amicus Counsel's Motion to Seal Identity of Jurors, which the Court granted on 11/18/22. The copy of the motion sent to counsel mistakenly included "Juror List Alphabetical Key."

Rule 4.4(b) of the New Hampshire Rules of Professional Conduct makes clear that, given the Court's granting of the motion, I should not examine the List. However, I inadvertently did because I did not know that the List was the second page of the filing I received.

The purpose of this email is to advise the Court that I, along with Attorney Eggleton, have destroyed the List. As a function of firm protocol two administrative people in the firm received copies of the filing and I have instructed them to destroy their copies of the List.

Respectfully,

William L. Chapman

William L. Chapman

Orr&Reno
Sustained Excellence Since 1946

45 South Main Street, P.O. Box 3550

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THE STATE OF NEW HAMPSHIRE

COÖS, SS.

SUPERIOR COURT

No. 214-2019-CR-00078

State of New Hampshire

v.

Volodymyr Zhukovskyy

ORDER

It has come to the Court's attention that the Clerk's office inadvertently sent the Court's November 18, 2022 order granting Amicus Counsel's Motion to Seal Identity of Jurors and the "key" referred to in said motion to four parties, other than amicus counsel, on the service list. The Court orders each such other party to destroy said Motion to Seal and attached "key" immediately.

So Ordered.

Date:

11/22/2022



Hon. Peter H. Bornstein
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/22/2022

Attachment re:
Paragraph 13
(Questions to be Raised
on Appeal)

Questions Raised on Appeal

Petitioner, in reliance on *Petition of Keene Sentinel*, 136 N.H. 121 (1992), filed this case to obtain access to the names and addresses of the jurors who sat on and rendered the verdict in *State v. Zhukovskyy*. The issue raised by the petition is whether the court record that contains this information (the “List”) is governed by the presumption of access discussed in *Petition of Keene Sentinel* and more recently in *State v. Kibby*, 170 N.H. 255, 258-259 (2017):

“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, 809 A.2d 752 (2002) (citations omitted).

“[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 public's right of access to those records.” *Petition of Keene Sentinel*, 136 N.H. at 128, 612 A.2d 911....

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 ... 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.*; see *Petition of Keene Sentinel*, 136 N.H. at 129–30, 612 A.2d 911.

The trial court, in its April 4, 2023 Order, ruled that the List is not governed by the presumption of access but even if it were, the public’s interest in access is outweighed by the jurors’ concern for their safety and privacy and the judiciary’s ability to impanel fair and impartial jurors in future cases. The Order raises seven questions for appeal:

1. Did the trial court err by ruling that the List “is not a court document for purposes of Part I, Articles 8 and 22 ... because it is not filed in connection with a case.” Order at 5.
2. Did the trial court err by concluding that the List is not a “court record” as defined in *Petition of Union Leader Corp.*, 147 N.H. 603, 605 (2002)(records that “directly relate or pertain to court proceedings or the superior court's adjudicatory functions”). Order at 5-6.

3. Did the trial court err by ruling that the List is not “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.,” citing *Associated Press v. State of N.H.*, 153 N.H. 120, 134 (2005). Order at 6-7.
4. Did the trial court err by ruling that the right of access does not apply to the List because the names and addresses of the jurors are drawn from the questionnaires they completed, which are confidential under N.H. R. Crim. P. 22(b)(2). Order at 7-8.
5. Did the trial court err by failing to consider whether the jurors’ interest in privacy, including a stated unwillingness to speak with the Boston Globe’s reporter, protection against harassment, and concern for physical safety would be addressed by the four conditions to which Petitioner agreed if the court released the names and addresses to it: “(i) that the juror does not have to speak to [the Globe reporter]; (ii) that if the juror decides to speak with [the reporter], the juror would have the right to stop the conversation at any time or refuse to answer any question; (iii) that the juror has the right to be an anonymous source for any article the Boston Globe writes about the Zhukovskyy case; and (iv) 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.” See Boston Globe Media Partners, LLC’s Hearing Memorandum at 6. Order at 8-12.
6. Did the trial court err by weighing in favor of nondisclosure ... the harm that disclosure could cause our justice system and the ability of New Hampshire courts to select fair and impartial jurors in the future, Order at 11, in the absence of evidence in the record to support that conclusion.
7. Did the trial court err in concluding that “the jurors were not in a unique position to observe and evaluate the trial” because WMUR had “livestreamed the entire trial,” meaning that “the public had an even better view of the witnesses ... and the public was able to see parts of the trial that were not available to the jury,” Order at 13, in the absence of evidence in the record to support that conclusion.