

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SEPTEMBER TERM 2024

State of New Hampshire

v.

Danielle Dauphinais

226-2021-CR-0944


**STATE'S ASSENTED-TO MOTION TO PRECLUDE THE COPYING
OR DISSEMINATION OF CERTAIN TRIAL EXHIBITS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General [“the State”], and files this motion to preclude the third-party copying of certain trial exhibits. In support thereof, the State submits the following:

1. The defendant is charged with first-degree murder, an alternative charge of second-degree murder, reckless, three counts of tampering with witnesses, and two misdemeanor counts of endangering the welfare of a child for causing the death of Elijah Lewis (Age: 5). The defendant’s trial is scheduled to begin with jury selection on October 8, 2023.

2. The State is under the impression and belief that the instant trial will be subject to media coverage, possibly including “live feed” streaming, whereby the proceedings are contemporaneously played over the internet, as well as in-court traditional journalists. Among other exhibits, the State anticipates introducing several photographs showing the deceased victim at his burial location, and certain photographs taken during the ensuing autopsy. The State anticipates presenting these materials during testimony from the New Hampshire State Police K9 officer who located the body and from the medical examiner. The State requests the Court

Granted


Honorable Charles S. Temple
September 20, 2024

The Court finds that there are compelling privacy interests and constitutional protections that justify this assented to relief. Clerk's Notice of Decision Document Sent to Parties on 09/20/2024

preclude the livestream filming or copying of any such photographs during the testimony of these two witnesses.

3. As to the trial exhibits discussed *supra*, they should be openly accessible for public inspection. *See* N.H. R. Crim. Proc. 50(a)(1). However, those same exhibits should be subject to a judicial protective order in which any copying, reproduction, photographing, or livestreaming thereof cannot be done without first receiving the Court’s authorization, after application by motion with proper notice to the State and the defense. *Cf.* N.H. R. Crim. Proc. 50(e) (setting forth similar procedure when person seeks access to sealed documents).

4. The State begins by noting its recognition that the public “is generally afforded unfettered access” to court records. *In re Union Leader Corp.*, 147 N.H. 603, 604 (2002).¹ Moreover, “a party seeking closure or nondisclosure of court records has the burden to demonstrate, with specificity, a sufficiently compelling interest, outweighing the public’s right of access.” *Id.* As noted, the State’s position is not that the exhibits identified above, should be inaccessible to the public. Rather, the issue is one of dissemination, rather than access.² To the extent that the legal standards just discussed applicable to restricting public access apply with

¹ The present matter does not implicate constitutional rights of the public and press to attend and observe judicial proceedings. The general public and the press have access to the trial unrestricted except for those potential witnesses covered by an active sequestration order. *See* N.H. R. Evid. 615. Although livestream video was directed by the Court not to record limited and specific exhibits, recording of the subject testimony was unrestricted. *See United States v. Dimora*, 862 F. Supp. 2d 697, 703-04 (N.D. Ohio 2012) (“The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and report what they have observed. The constitutional right to a public trial does not, however, extend to the right of the public and the press to inspect and copy exhibits that have been admitted during the public trial.”) (internal quotations and citations omitted).

²As to the State’s request that during trial, there should be a restriction of contemporaneous access to certain exhibits during the livestream feed, that position is informed by additional compelling interests, such as ensuring the defendant’s right to a fair trial and preventing possible juror exposure to prejudicial information outside the courtroom.

equal force to restricting public dissemination, the State can point to specific compelling interests that weigh in favor of the protective order requested.

5. First, there are privacy rights afforded to those individuals whose images are captured on the identified trial exhibits. Here, that right not only applies to the murder victim himself, but also to his immediate family. *See* RSA 21-M:8-k, I(a) (“‘Victim’ . . . includes the immediate family of . . . a homicide victim. . . .”). Among the protections afforded to the victims here by New Hampshire’s Victim Bill of Rights is “[t]he right to be treated with fairness and respect for [his or her] dignity[] and privacy throughout the criminal justice process.” RSA 21-M:8-k, II(a).

6. Separate and apart from victim privacy rights are privacy rights of family members, with respect to the decedent victim’s images in death. As discussed at length by one appellate court:

No court has yet held that this [substantive due process] right encompasses the power to control images of a dead family member, but the Supreme Court has come close in a case involving the Freedom of Information Act. In *National Archives and Records Administration v. Favish*, 541 U.S. 157, 170-71 [] (2004), the Court held that death scene photographs fell under an exemption to [the Freedom of Information Act’s] general requirement of public access to government information, which carved out “law enforcement records or information . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy.” The Court found that the right to “personal privacy” included the “surviving family members’ right to personal privacy with respect to their close relative’s death scene images.”

The Court had little difficulty “finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member’s remains for public purposes.” “Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”

March v. County of San Diego, 680 F.3d 1148, 1153-54 (9th Cir. 2012) (internal quotations and citations omitted); *see also, e.g., Catsouras v. Dept. of California Highway Patrol*, 104 Cal. Rptr.

352, 363-67 (Cal. App. 4th 2010) (discussing *Favish* and other cases that have concluded “that family members do have their own privacy rights in death images.”). The Ninth Circuit went on to conclude that the privacy right at issue was encompassed by substantive due process. *See March*, 680 F.3d at 1154-55. The Court here need not decide whether such constitutional privacy rights exist, given the common law privacy right recognized by the United States Supreme Court, as well as the statutory privacy right codified in the Victim Bill of Rights.

7. The separate and independent privacy rights set forth above constitute specific and sufficiently compelling interests that outweigh public dissemination of the trial exhibits discussed above. Those particular exhibits depict the decedent victim in death, including during an invasive autopsy procedure.

8. The State’s position not only recognizes the weighty privacy interests at issue, but also pays proper consideration to the also weighty interest in public access to records, and strikes an appropriate and narrowly-tailored balance between the two. It also bears repeating that the State is not seeking to restrict access, but rather dissemination, and only of a limited number of the exhibits anticipated to be used at trial. Additionally, the State’s position does not at this time seek, or necessitate, a complete denial of dissemination of the identified exhibits. Instead, a party seeking to copy, reproduce, and/or photograph any of the subject exhibits simply must first apply to do so by proper motion. At that time, the Court can consider the particular request at issue—including the intended purpose and scope of sought-after dissemination—and can decide in context whether dissemination may be appropriate, either without restriction or with appropriate safeguards—such as redaction of identifying, graphic, and/or sensitive information—that take into account all applicable factors, including concerns of individual privacy and public knowledge.

9. On September 11, 2024, the Counsel for the defendant, through Attorney Benjamin Falkner, indicated their assent to this Motion.

WHEREFORE, the Attorney General for the State of New Hampshire respectfully requests that this Honorable Court:

- A. Issue an Order consistent with this submission; and
- B. Grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

September 20, 2024

/s/ Bethany J. Durand
Bethany J. Durand, NH Bar ID #273943
Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place, South
Concord, New Hampshire 03301
(603) 271-3671

/s/ Meghan C. Hagaman
Meghan C. Hagaman, NH Bar ID# 20804
Senior Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place, South
Concord, New Hampshire 03301
(603) 271-3671

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was provided to counsel of record through the Court's efile system.

September 20, 2024

/s/ Bethany J. Durand _____
Bethany J. Durand