UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LMG RHODE ISLAND HOLDINGS, INC. Plaintiff	)	
vs.	)	C.A. 18-cv-297
RHODE ISLAND SUPERIOR COURT, PROVIDENCE COUNTY, HON. NETTI C. VOGEL, and EUGENE J. MCCAFFREY, III Defendants	)	

MEMORANDUM OF AMICI CURIAE IN RESPONSE
TO DEFENDANTS' MOTION TO DISMISS

The Amici Curiae hereby file this Memorandum in respond to Defendants' Motion to Dismiss. The Amici Curiae submit that newspapers, other media, and the public, including attorneys, generally have a right to speak with and interview jurors after a trial, which right is protected by the First Amendment of the United States Constitution and Article 1, Section 21 of the Rhode Island Constitution. The Superior Court violated that right with its April 6, 2018 bench order.

On May 7, 2018, the Superior Court vacated its April 6, 2018 bench order and then, on May 16, 2018, issued "Comments" in which Justice Vogel stated that she would not further preclude the media from contacting jurors. Nonetheless, in Part VII of Defendants' Memorandum in Support of their Motion to Dismiss they argue that the April 6th bench order was appropriate. The Amici Curiae submit this memorandum to assert that the bench order violated both the First Amendment and Article 1, Section 21 of the Rhode Island Constitution.

STATEMENTS OF INTEREST OF THE AMICI CURIAE

The Amici Curiae are the American Civil Liberties Union of Rhode Island ("ACLU-RI"), the New England First Amendment Coalition ("NEFAC"), the Rhode Island Press Association ("RIPA"), and Sinclair Broadcast Group, Inc. ("Sinclair").

ACLU-RI, with over 6,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution and, especially, the First Amendment. ACLU-RI, through its volunteer attorneys, has appeared in numerous cases in state and federal court, both as counsel for parties or, as here, as amicus curiæ on numerous issues involving judicial limitations on the exercise of First Amendment rights. See, e.g., In re Providence Journal Company, 293 F.3d 1 (1st Cir. 2002); State v. Lead Industries Association, Inc., 951 A.2d 428 (R.I. 2008); United States v. Providence Journal, 485 U.S. 693 (1988); and Ruggieri v. Johns-Manville, 503 F.Supp. 1036 (D.R.I. 1980). Because the court directives at issue in this case raise issues of profound importance to First Amendment freedoms, ACLU-RI has an interest in the outcome of this case and believes that participating as amicus curiae will assist the Court in resolving the very significant issues at stake.

NEFAC is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the

principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

RIPA is a nonprofit organization which supports and promotes print journalism across the state, as well as supports the right of a free press and the First Amendment. Many Rhode Island print publications are part of RIPA, including, but not limited to, The Newport Daily News, The Woonsocket Call, The Valley Breeze, The Warwick Beacon, The Providence Business News, and the state's largest paper of record, The Providence Journal. RIPA is deeply troubled by Superior Court Justice Netti C. Vogel's initial order to ban the media from contacting jurors who served in the recent murder trial of Jorge DePina. Justice Vogel's May 7, 2018 order still appeared to bar the general public from speaking with the jurors, which is an infringement of the First Amendment. RIPA supports the Providence Journal's stance that reporters should have access to a list of jurors since those documents are public record and such access is Constitutionally protected. Judge Vogel's denial also deprived the public of an understanding of how and why such verdicts are rendered.

Sinclair Broadcast Group is one of the largest and most diversified television broadcasting companies in the country. Based in Hunt Valley, Maryland, Sinclair owns and operates, programs, or provides sales services to 192 television stations in 89 U.S. markets. Sinclair also owns a multicast network, four radio stations, and a cable network. Its stations include WJAR ("NBC 10") in Rhode Island, which extensively covered the Jorge DePina trial.

FACTS

1. Plaintiff Providence Journal has the largest circulation of any daily newspaper in the State of Rhode Island. https://www.agilitypr.com/resources/top-media-outlets/top-10-alabama-daily-newspapers-by-circulation/.
2. Defendant Superior Court is the Rhode Island state trial court of general jurisdiction.
3. Defendant Associate Justice Netti C. Vogel is an associate justice of the Superior Court.
4. On July 11, 2013, Jorge DePina was charged with the murder of his ten-year-old daughter. Suffice to say, the alleged crime was notorious. The Providence Journal provided extensive coverage of the crime and the prosecution of DePina, as did numerous other media, including WJAR.
5. WJAR broadcast these stories about the trial:

   http://turnto10.com/news/local/trial-begins-for-man-accused-of-killing-10-year-old-daughter

   http://turnto10.com/news/local/murder-defendant-cries-at-videos-of-10-year-old-daughter

   http://turnto10.com/news/local/neighbor-testifies-about-10-year-old-murder-victim

   http://turnto10.com/news/local/closing-arguments-set-in-depina-murder-trial

   http://turnto10.com/news/local/pawtucket-man-found-guilty-of-2nd-degree-murder-in-death-of-10-year-old-daughter

6. Beginning in March 2018, Justice Vogel presided over a three-week jury trial during which the State of Rhode Island prosecuted DePina for the alleged murder. On April 6, 2018, the jury returned a verdict finding DePina guilty of second degree murder. The jury acquitted DePina of first degree murder.
7. Immediately following the verdict, Justice Vogel made the following statement on the record:

> No one, no spectator, no one in the spectator section of the courtroom, is permitted to contact my jurors. If the jurors choose to contact anyone, that's up to them. This is for their protection. The jurors have completed their job, and when they leave here, and they will be escorted to the door or to the area where they catch their bus, unless they show great interest in speaking to the lawyers, and I mean these four lawyers, do not approach them. No one else is to approach them.
>
> That is how it is. I want to protect their privacy. They have done their job, they have been here three weeks, and the attorneys on the case, if they wanted to speak to the jurors and the jurors showed interest in speaking to you, whole different story. But beyond that, if they don't show any interest, they have to be left alone. If you see them at Walmart, do not acknowledge that you know them. In other words, I do not allow people to contact jurors. They must be left alone to go on with their lives. (emphasis added).
>
> (Doc. 1-2, pp. 3-4).

8. Some media outlets would have attempted to interview the jurors but for Justice Vogel's orders.

9. One month later, on May 7, 2018, Justice Vogel issued an order in the criminal case which states:

> The order issued from the bench on April 6, 2018, immediately following the jury verdict in the above captioned case, wherein the Court ruled that spectators in the courtroom were precluded from contacting jurors is hereby vacated. Members of the media are not precluded from contacting the jurors.
>
> (Doc. 6-5).

10. On May 16, 2018, the Superior Court issued Justice Vogel's "Comments" which stated, *inter alia*: "After learning that the Providence Journal took issue with my comments, I notified General Counsel for Court that in the future, I would not preclude the media from initiating contact with jurors." (Doc. 1-3).

ARGUMENT

The April 6, 2016 bench order violated the First Amendment. Moreover, a comparison of analogous federal and state case law shows the Rhode Island Supreme Court would follow federal law and, under Art. 1, Sec. 21 of the Rhode Island Constitution, would hold that the

media and the public generally have a right of access to jurors after the jury has rendered its verdict. The Superior Court's April 6th bench order appeared to bar even members of the public not present from discussing the trial with jurors. ("In other words, I do not allow people to contact jurors. They must be left alone to go on with their lives."). The Court's May 7, 2018 order vacated the April 6th bench order and Justice Vogel's May 16, 2018 "Comments" indicated she would no longer preclude the media from initiating contacts with jurors. Nonetheless, in Part VII of their Memorandum in Support of their Motion to Dismiss, Defendants argue Justice Vogel's bench order was appropriate. Accordingly, the Amici Curiae file this Response to address that argument.

I. THE UNITED STATES AND RHODE ISLAND CONSTITUTIONS RECOGNIZE A RIGHT OF ACCESS TO THE COURTS

Federal courts have long recognized a right of access to the courts under the First Amendment of the United States Constitution. Press-Enterprise Co. v. Superior Court, 478 U.S 1 (1986) ("Press-Enterprise II") (a qualified First Amendment right of access attaches to preliminary criminal hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I") (the public's constitutional right of access includes a right to attend jury selection in criminal trials and obtain a transcript of it); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1983) (Massachusetts statute excluding the public from all rape trials involving minors violates the First Amendment right of access); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (the public has a qualified right to attend criminal trials). The public's right of access is coextensive with that of the media. See Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972). Thus, the general public has just as much of a right to contact jurors about the trial as the media or anyone who was a spectator in the courtroom.

In Richmond Newspapers, Chief Justice Burger wrote eloquently about the importance of public access to criminal trials:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. [citation omitted]. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some sort of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.

Id. at 571. The Chief Justice continued:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." [citation omitted].

Id. Here, the Amici Curiae submit that the Court should also hold that the administration of justice, including the jurors' views and insights on the trial and on their verdict, should not operate in a "covert manner."

The Rhode Island Supreme Court has indicated it will look to federal decisions applying the First Amendment to interpret the meaning and scope of Article 1, Sec. 21 of the Rhode Island Constitution, which states, in part: "No law abridging the freedom of speech shall be enacted." See, e.g., Town of Barrington v. Blake, 568 A.2d 105, 1018 (R.I. 1990). Like the federal courts, the Rhode Island Supreme Court has repeatedly recognized a right of press and public access to trials, including during voir dire. See Providence Journal Co. v. Superior Court, 593 A.2d 446 (R.I. 1991) ("Superior Court"); State v. Cianci, 496 A.2d 139 (R.I. 1985) ("Cianci"). In Cianci, the parties requested that the discovery on file on a criminal case be sealed from the public. Without holding a hearing, the Superior Court entered a protective order providing that all discovery materials should be sealed. The Supreme Court issued a writ of certiorari and

reviewed the prior U.S. Supreme Court decisions respecting when a trial court may close court proceedings or records to the public and said:

> What emerges from these cases is a four-part inquiry that should be made by the trial court before closure is justified. A protective order (1) must be narrowly tailored to serve the interest sought to be protected, (2) must be the only reasonable alternative, (3) must permit access to those parts of the record not deemed sensitive, and (4) must be accompanied by the trial justice's specific findings explaining the necessity for the order.

496 A.2d at 144. The Court held: "It is clear that the trial court's brief inquiry and blanket statement of a potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of the discovery documents." Id. at 145. The Court remanded for a "more thorough inquiry and explanation, based on the four criteria." Id. Further, "before making a decision, the trial justice should conduct a hearing at which representatives of the press may be heard before they are excluded or material is ordered sealed." Id.

In Superior Court, the Superior Court closed the individual voir dire examination of the prospective jurors to the press and public. The Supreme Court issued a writ of certiorari. It said its holding in Cianci applied to the Superior Court's actions in Superior Court:

> In applying the standard enunciated in Cianci to the facts of this case, we come to the conclusion that the trial court's closure of the individual voir dire examination of prospective jurors may have been an unconstitutional infringement on the press and public's right of access to criminal proceedings because the four-part inquiry set forth in Cianci was not complied with. The trial court concluded that concern for the privacy rights of prospective jurors and the defendant's right to a fair trial merited limited closure. This conclusion, however, was unsupported by any facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice those important interests. Consequently there was no compelling governmental interest that justified the limit imposed by the trial court on the press and public's right of access. In this respect the trial court's concerns were speculative and were an insufficient basis on which to conclude that a limited closure was necessary.

593 A.2d at 449. The Court said that rather than entirely closing the voir dire because of privacy concerns, it should inform the jurors that they may request an *in camera* voir dire for "matters

that are sufficiently sensitive to justify the extraordinary measure of a closed proceeding." Id., quoting In re Dallas Morning News Co., 916 F.2d 205, 206-07 (5th Cir. 1990).

In In re Derderian, 972 A.2d 613 (R.I. 2009), the Providence Journal sought access to 32-page questionnaires that the prospective jurors had completed to aid in jury selection during the criminal case resulting from the Station Nightclub Fire. Defendant was charged with 100 counts of involuntary manslaughter under two different theories. The questionnaire said the responses were not confidential but if the juror chose, he or she could respond "private" to a particular question and the court would question him or her privately about it. After the defendant had pled guilty, the trial justice disclosed the form questionnaire to the media but declined to provide the completed questionnaires. The Journal appealed.

The Supreme Court discussed "[t]he competing First Amendment and Sixth Amendment principles at issue in the instant matter…" Id. at 617. "Not only does this case concern the public's First Amendment right of access to jury selection in criminal proceedings and future defendants' Sixth Amendment right to a fair trial, it also involves the privacy interests of all people who have been or who will be called to serve on a jury and the judiciary's interest in the fair and efficient administration of justice." The Court noted:

> The value of openness in the jury selection process has been articulated by the First Circuit Court of Appeals: "[I]nformation 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…Juror bias or confusion might be uncovered, and jurors' understanding and response to judicial proceedings could be investigated."

Id. at 618, n.3, quoting In re Globe Newspapers Co., 920 F.2d 88, 94 (1st Cir. 1990) . Nonetheless, the Supreme Court found the issue had been rendered moot by Derderian's plea and it was unlikely to repeat itself. Id. at 618. Thus, the Rhode Island Supreme Court has indicated that the First and Sixth Amendments could work in tandem to assure fair jury trials.

Similarly, in State v. Torres, 844 A.2d 155 (R.I. 2004), the Supreme Court considered whether it was proper for the Superior Court to exclude the defendants' two sisters from the courtroom during voir dire. The Court initially held that the Sixth Amendment and Art. 1, Sec. 10 of the Rhode Island Constitution "both provide that accused persons in criminal prosecutions shall enjoy the right to a public trial." Id. at 158. "The public-trial requirement benefits the defendant, discourages perjury, and ensures that judges, lawyers, and witnesses perform their duties responsibly." Id. The Court added: "In Press-Enterprise Co. v. Superior Court, the Supreme Court held that the press and public's right of access to criminal trials under the First Amendment extends to the voir dire examination of potential jurors." Id.[1]

The Court concluded that "the trial justice's action deprived the defendant of the inherent protections of the Sixth Amendment, specifically, the assurance that those individuals participating in his trial perform their respective duties honestly, fairly and responsibly." Id. at 162. The Court reversed the defendant's conviction. The Amici Curiae point out that a similar prohibition on the media and the public discussing the trial with jurors also deprives defendants and the public of assurances that the individuals participating in the trial performed their duties.

Moreover, jurors in Rhode Island have historically been accessible to the media and others after they have rendered their verdicts. There are examples of jurors giving interviews after other Superior Court trials as recently as 2016 and going back at least as far as 1987:

http://www.telegram.com/sports/20161205/worcester-native-dan-doyle-convicted-of-embezzlement-from-ri-sports-institute

[1] The Court noted that: "The Press-Enterprise Court enunciated the following inquiry: 'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Id., n. 3, citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

http://caught.net/2018/hazard2.htm

https://www.upi.com/Archives/1987/12/10/Insurance-agent-Stanley-Henshaw-III-was-acquitted-Thursday-of/9839566110800/

The Rhode Island Supreme Court has clearly indicated it will follow U.S. Supreme Court and other federal precedent with respect to keeping Superior Court trials open to the media and the public, including the views of jurors, as expressed during voir dire. Thus, Amici Curiae respectfully suggest that with respect to Art. 1, Sect. 21 of the Rhode Island Constitution, the Rhode Island Supreme Court would similarly follow federal decisions respecting access to jurors after they have rendered their verdict, a stage where any arguments against disclosure are even less compelling.

II. COURTS IN OTHER JURISDICTIONS RECOGNIZE A RIGHT OF THE MEDIA AND THE PUBLIC, INCLUDING THE PARTIES' ATTORNEYS, TO INTERVIEW JURORS AFTER A VERDICT

The First Circuit and courts in other jurisdictions have generally held that the First Amendment permits the media, the parties' attorneys, and the public to speak with and interview jurors after the verdict. In re Globe Newspapers Co., 920 F.2d at 92; United States v. Wecht, 537 F.3d 222 (3rd Cir. 2008); United States v. Long, 250 F.3d 907 (5th Cir. 2001); In re Baltimore Sun Co., 841 F.2d 74, 75 (4th Cir. 1988); Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986); United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); United States v. Doherty, 675 F. Supp. 719, 721 (D. Mass. 1987); Commonwealth v. Fujita, 470 Mass. 484, 23 N.E.3d 882 (2015); Commonwealth v. Long, 592 Pa. 42, 922 A.2d 893 (2007); State ex rel. Beacon Journal Publ'g Co. v. Bond, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002); In re Disclosure of Juror Names & Addresses, 233 Mich. App. 604, 605–06, 592 N.W.2d 798, 799 (1999); Des Moines Register & Tribune Co. v. Osmundson, 248 N.W.2d 493 (Iowa 1976); see also Ramirez

v. State, 922 So.2d 386 (Fla.App. 2006) (holding defense counsel were entitled to interview jurors respecting alleged premature deliberations before filing defendant's new trial motion).

The First Circuit has held that "…given the absence… of particularized findings reasonably justifying non-disclosure, the juror names and addresses must be made public." In re Globe Newspapers, 920 F.2d at 92. In that case, the district court judge advised the jurors that it is at their own discretion whether they speak to the media, and that anything regarding jury deliberations should be kept confidential. That same day, when reporters from the "The Globe" tried to obtain the jury information, they were denied access. The First Circuit held that the trial judge must identify "specific, valid reasons necessitating confidentiality in the particular case. To justify impoundment after the trial has ended, the court must find a significant threat to the judicial process itself." Id. at 90. The Court said that a judge may specifically determine a need for jury confidentiality when the "interests of justice" so require and absent that determination, juror information is publicly available information. This "interest of justice" standard requires a specific and convincing reason why the court should withhold the juror identities. Further, the trial court should withhold those identities only in exceptional cases. Id. at 91. Such circumstances would be a credible threat of jury tampering; risk of personal harm to individual jurors; and other evils affecting the administration of justice. These circumstances do not include the mere personal preferences or views of the judge or jurors. Id. at 92.

The Third Circuit has held that "a tradition of openness exists and that anonymous juries have been the rare exception rather than the norm." United States v. Wecht, 537 F.3d 222 (3rd Cir. 2008). To determine what aspects of a criminal trial are subject to public access, the Court applied the "experience and logic" test outlined by the United States Supreme Court in Press Enterprise I. Id. at 235-39. First, courts will look to experience in whether the information has

historically been open to the public. Id. Second, they will look to see if public access plays a significant role in the functioning of the particular process in question. Id. The Court in Wecht found that under the "experience" prong, historically, juror information has been available to the public and it is seen as a presumptive right. Id. at 235-37. As to the "logic" prong, the Court stated it is a case-by-case analysis and there must be particular findings establishing the existence of a compelling government interest. Id. at 238-39. Under the Supreme Court's "experience and logic test," juries should not be anonymous absent a specific, compelling government interest.

The district court in Wecht set forth three explanations why it decided to empanel an anonymous jury, including, first, the impact on juror's willingness to serve on juries if their identities were public knowledge. The Third Circuit found that this argument was too general and that access to jury information is necessary to ensure the fairness on which our justice system thrives. Id. at 240. Second, the district court stated there would be an increased risk of intimidation of jurors if their information was open to the public. The Third Circuit found this to be too conclusory and generic, therefore justifying anonymity for every jury. The Circuit Court said the trial court must find a specific, definite need for anonymity. Id. at 240-41, citing United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988). Third, the district court stated that defendants may have made many enemies and these enemies could find their way into the jury pool. The Third Circuit said this factor indicated that the media should then be allowed to have access to jury information to ensure these enemies do not enter the jury pool. Id. at 241-42. Juror information must be kept available to the public to ensure the integrity of the First Amendment. In the rare occurrence when jury information is kept anonymous, the trial court must make a finding of specific circumstances and those circumstances must be compelling.

A study of 761 news articles involving juror interviews over an eighteen-year period demonstrated that "post-verdict interviews serve valuable purposes: they can help ensure jury accountability; they can help the public understand, and therefore accept, trial outcomes; they can educate the public about the realities of jury service; and they can improve the justice system's functioning by exposing mistakes, misunderstandings, and misconduct." Nicole B. Cásarez, Examining the Evidence: Post-Verdict Interviews and the Jury System, 25 Hastings Comm. & Ent. L.J. 499, 602 (2003). The same study showed that "any furor over the perceived negative effects of post-verdict interviews is little more than a tempest in a teapot." Id. at 507. "The predicted horrors associated with post-verdict juror interviews have not materialized." Id.

A few examples prove those conclusions. At one of several federal trials of John Gotti, the trial court empaneled an anonymous jury which prevented the prosecutors and the public from discovering that one of the jurors, George Pape, had ties to organized crime. Abraham Abramovsky & Jonathan I. Edelstein, Anonymous Juries: In Exigent Circumstances Only, 13 St. John's J. Legal Comment., 457, 466-67 (1999). Pape lied during voir dire about his connections to organized crime. Id. at 480. He received a bribe and delivered an acquittal. Had federal prosecutors or the public been able to investigate Pape's background, "his potential for corruption might have been unearthed prior to trial." Id. at 480-81.

The wrongful conviction and near-execution of Anthony Porter illustrates the important role of the press and public as a check on the criminal justice system. In Porter's case, among the jurors who voted to convict was an acquaintance of the victim's mother who had also attended the victim's funeral. Neither of these facts had been unearthed at voir dire. Porter spent seventeen years on death row and exhausted his appeals. Due to the investigative efforts of student journalists, he was exonerated within two days of scheduled execution. Ken Armstrong

et al., *Death Row Justice Derailed*, Chicago Tribune, (Nov. 14, 1999)[2] ("Porter was saved not by the justice system, but by journalism students.").

Juror interviews by a group of investigative journalists and WBUR recently led a state court in Massachusetts to order a new trial for a Boston man, Darrell Jones, who may have been wrongly incarcerated for 32 years. According to the Boston Globe:

> Allegations of racial bias in the court were raised in a 2016 investigation by the New England Center for Investigative Reporting and WBUR public radio. Juror Eleanor Urbati, a white Hingham resident who said she always regretted convicting Jones, told the center that two jurors had told her they thought the defendant was guilty because he was black.
>
> [Judge Thomas F. McGuire Jr.], wrote that he first learned of allegations of racial bias when someone flagged the 2016 investigation and then requested Urbati and other jurors to detail what had occurred.

Jennifer McKim, "Man In Jail 30 Years Released on Bail," Boston Globe, (Dec. 22, 2017), 2017 WLNR 39612422; see also "Reasonable Doubts: Reopening the Case of Darrell 'Diamond' Jones," WBUR News (Jan. 11, 2016).[3]

Accordingly, for all these reasons, it seems clear that, under the First Amendment and Art. 1, Sec. 21 of the Rhode Island Constitution, both the First Circuit and the Rhode Island Supreme Court would recognize a right of the media, the parties, through their counsel, as well as other members of the general public to communicate with jurors about the trial after they have rendered their verdict.

The cases which Defendants cite, (Defendants' Memorandum, Doc. 6-1, pp. 22-23), do not support Justice Vogel's bench order. In Zemel v. Rusk, 381 U.S. 1 (1965), the Supreme Court affirmed a State Department order denying American citizens the right to travel to

[2] *available at* http://articles.chicagotribune.com/1999-11-14/news/9911150001_1_death-row-capital-cases-capital-punishment.po.
[3] http://www.wbur.org/news/2016/01/11/darrell-jones-investigation.

Communist Cuba after the United States broke diplomatic relations with that country. Presumably, Defendants do not analogize the Superior Court jurors to Fidel Castro.

Defendants rely on Justice Blackmun's concurring opinion in Press-Enterprise I, 464 U.S. at 513. Even there, Justice Blackmun discussed only whether a juror has a privacy right with respect to his "highly personal or embarrassing information simply because he is called to do his public duty." Id. at 514. Here, there was no apparent issue of the jurors being asked about highly personal or embarrassing information disclosed during voir dire.

In U.S. v. Doherty, 675 F.Supp. 719 (D.Mass. 1987), the district court discussed the defendants' right to a fair trial and the competing interests set forth in the First Amendment. It then said: "It is for these reasons that it was appropriate for this Court to counsel—though I did not and could not order—that the discharged jurors refrain from discussing their deliberations with anyone." Id. at 724. The court then considered the jurors' objection to having their names and addresses revealed to the press. The court acknowledge that "this privacy interest is by no means absolute." Id. citing Press-Enterprise I, 464 U.S. at 511.[4] The court said it would balance the First Amendment and privacy interest involved by revealing the jurors' names and addresses seven days after they returned their verdict. Here, the Superior Court initially barred the media from initiating any access to the jurors forever.

All of the other cases Defendants cite are from the Fifth Circuit which appears to have a unique view of juror privacy. Notwithstanding that position, not all those decisions support Defendants' position. For example, in U.S. v. Hamilton, 713 F.2d 1114 (5th Cir. 1983), the district court issued an order after the defendants were found guilty of the murder of a federal

[4] Notably, the district court expressly declined to define the scope or basis of the privacy right involved. Id., n. 5.

district court judge, which order vacated a prior order barring the media from interviewing the jurors. The second order set forth four restrictions:

1. No juror has any obligation to speak with any person about this case and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.
4. No interview may take place until each juror has received a copy of this order.

Id. At 1116. The circuit court simply affirmed this order as within the trial court's discretion. Id. at 1117. Here, the Superior Court's bench order completely barred the media from initiating any contact with the jurors.

Moreover, in a subsequent decision, the Fifth Circuit explained that a juror may be interviewed about his own "general reactions to the trial proceedings, and he is prevented only from being interviewed about the private debates and discussions which took place in the jury room during the time leading up to the jury's rendering of its verdict." U.S. v. Cleveland, 128 F.3d 267, 279 (5th Cir. 1997).

Two of the Fifth Circuit decisions concern very highly publicized trials of Louisiana's governor, Edwin Edwards, and associates, for alleged corruption. U.S. v. Barnes, 250 F.3d 907 (5th Cir. 2001); U.S. v. Edwards, 823 F.2d 111 (5th Cir. 1987). In Barnes, the district court had promised the prospective jurors during voir dire that they could remain anonymous. The Fifth Circuit said: "Ensuring that jurors are entitled to privacy and protection against harassment, even after their jury duty has ended, qualifies as [a strong governmental] interest in this circuit." (emphasis added). Id. at 918. Obviously, this Court is not in the Fifth Circuit and the First Circuit's decision in In re Globe Newspapers Co., 920 F.2d at 94, indicates this Circuit takes a different position than the Fifth Circuit.

In Edwards, the district court conducted a mid-trial investigation into possible jury misconduct. The "Times-Picayune" newspaper sought access to the records of the investigation, which the district court denied. The Fifth Circuit upheld the district court's order where the newspaper "raises no issue concerning post-trial restrictions on its ability to interview jurors after the trial." Id. at 120. Here, that is exactly what the Superior Court's bench order restricted.

In U.S. v. Gurney, 558 F.2d 1202 (5th Cir. 1977), the Fifth Circuit addressed the release of jurors' names and addresses in a single sentence and a footnote. Id. at 1210, n. 12. Accordingly, these cases do not support Defendants' position.

III. THE SUPERIOR COURT'S PER SE PROHIBITION ON CONTACTING JURORS WAS UNCONSTITUTIONALLY OVERBROAD

The Superior Court's *per se* prohibition on communications with the jurors was overbroad. Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001); Contra Costa Newspapers, Inc. v. Superior Court, 61 Cal.App.4th 862, 72 Cal.Rptr. 2d 69 (1998). A statute (or an order) is overbroad and unconstitutional under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." See United States v. Stevens, 559 U.S. 460, 473 (2010); Cranston Teachers Alliance Local No. 1704 AFT v. Miele, 495 A.2d 233, 235 (R.I. 1985) ("Particularly suspect are laws that contain prohibitions that are too broad in their sweep, that fail to distinguish between conduct that may be proscribed and conduct that must be permitted."); Ferriera v. Gleason, No. 83-0210, 1983 WL 486824 at *4 (R.I.Super. Oct. 7, 1983) (overbreadth doctrine protects freedom of speech).

In Contra Costa Newspapers, the California Superior Court entered an order at the conclusion of a trial which required the press to abide by the jurors' preference not to be contacted. The trial judge confirmed in open court that the jurors purportedly did not want to be

contacted by the press. The newspaper filed a petition asking the trial court to withdraw the order, which petition the trial court did not address. The newspaper petitioned the appeals court. The appeals court said:

> Any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint, [citation omitted], and where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest and narrowly tailored to serve that interest. [citation omitted]. In the absence of particularized findings reasonably justifying nondisclosure, federal courts have required that juror names and addresses be made public after the trial has terminated. [citation omitted].

61 Cal.App.4th at 867, 72 Cal.Rptr.2d at 72. The court added:

> [T]he order was not directed at anyone in particular, it was not based on any showing of unreasonable behavior by anyone, and it was not carefully crafted to restrain conduct while preserving the constitutional rights of those interested in the trial. Accordingly, we conclude that the trial court's order restricting press contact with former jurors was without jurisdiction and was impermissibly overbroad. It contained no time or scope limitations and encompassed every possible juror interview situation.

Id. at 868, 72 Cal.Rptr.2d at 72-73. The appeals court vacated the trial court's order. Id., 72 Cal.Rptr.2d at 73. See also The State ex rel. the Cincinnati Post v. Court of Common Pleas of Hamilton County, 59 Ohio St.3d 103, 107, 570 N.E.2d 1101, 1104-05 (1991); In re State Farm Lloyds, 254 S.W.3d 632, 636 (Tex.App. 2008).

Moreover, it is clear that in Rhode Island there are some circumstances in which the jurors' views of the evidence and even their deliberations are not secret. There are historical instances of Rhode Island jurors speaking with the media after trials. Juror or other related misconduct may be an appropriate basis for a mistrial or a new trial or some other judicial remedy. See, R.I.R.Evid. 606(b) ("a juror may testify whether extraneous prejudicial information was brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."); see also, Amphavannasock v. Simoneau, 861 A.2d 451 (R.I.

2004) (discussing testimony of jury foreman about another juror's actions during deliberations); State v. Hartley, 656 A.2d 954, 961-62 (R.I. 1995) (juror affidavits are admissible for the sole purpose of showing that matters not in evidence reached the jury through outside communications).

Accordingly, the Superior Court's April 6th bench order was overbroad. It seemingly prohibited any contact by any person with any juror at any time for any reason under any circumstances. Nothing in the order limited its effect with respect to time, place, or manner of the communication. The order constituted a prior restraint on communications. Thus, it was facially overbroad and unconstitutional.

CONCLUSION

The Superior Court's April 6, 2018 bench order facially violated the Providence Journal's freedoms of the press and of speech under the First Amendment and Art. 1, Sec. 21 of the Rhode Island Constitution. The orders also violated the freedom of speech of other Rhode Islanders who may wish to speak with the jurors about the jurors' exercise of their citizenship duties. This prevents all of us from confirming whether the jury acted as the conscience of the community in discharging those duties and whether the jurors were confident in their verdict. The Superior Court's orders are also overbroad in that they place no reasonable limits as to the time, place, or manner of their prohibitions against free speech.

Amici Curiae, the American Civil Liberties Union of Rhode Island, the New England First Amendment Coalition, the Rhode Island Press Association, and Sinclair Broadcast Group, Inc., by their attorneys,

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CERTIFICATION

I hereby certify that a copy of foregoing was filed electronically through the Federal Court's electronic filing system and served upon all counsel of record on July 31, 2018.

/s/ Thomas W. Lyons
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