

IN THE SUPREME COURT OF MISSOURI

State ex rel. BuzzFeed, Inc.,)	
Relator,)	
)	
v.)	No. SC95265
)	
Honorable Jon Cunningham, Circuit)	
Judge, Division Five, Eleventh)	
Judicial Circuit, Saint Charles,)	
Missouri,)	
)	
Respondent.)	

AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS’S SUGGESTIONS IN SUPPORT OF RELATOR’S PETITION FOR A
WRIT OF PROHIBITION

Amicus curiae, The Reporters Committee for Freedom of the Press (the “Reporters Committee”), with the consent of all parties, respectfully submits this brief in support of Relator BuzzFeed, Inc.’s Petition for Writ of Prohibition directing Respondent, the Honorable Jon Cunningham, to vacate two orders and prohibiting him from sealing or otherwise closing the jury list from *State of Missouri v. Michael L. Johnson*, No. 1311-CR05915-01. Reporters Committee supports Relator’s arguments and urges this Court to review Relator’s petition in light of the importance of press access to judicial records.

Statement of Interest of *Amicus Curiae*

The Reporters Committee is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has a strong interest in

safeguarding the public's right of access to court documents in criminal cases, and in preserving the media's ability to report on criminal trials. All parties have consented.

Argument

I. The Court should grant review because juror lists are presumptively open under the First Amendment and their closure can be justified only upon a showing of a compelling governmental interest.

The U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980), held that the public and press have a First Amendment right to attend criminal trials, concluding that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” As the Court wrote, “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.” *Id.* at 576–77. In a later decision, the Court explained that “[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed” *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise I*”), 464 U.S. 501, 508 (1984).

The Court later concluded that the presumption of openness extends to *voir dire*, *Press-Enterprise I*, 464 U.S. 501, and preliminary hearings, *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise II*”), 478 U.S. 1 (1986). In these cases, the Court stressed that the presumption of openness can be overcome only by a compelling governmental interest, and any restrictions on the right of access must be narrowly tailored to that interest. *Press-Enterprise I*, 464 U.S. at 510.

Although the U.S. Supreme Court has never squarely addressed the issue, numerous lower federal and state courts have found a presumptive First Amendment right of access to jury lists. *See United States v. Wecht*, 537 F.3d 222 (3d Cir. Pa. 2008); *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002); *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892 (2007); *People v. Mitchell (In re Juror Names)*, 233 Mich. App. 604, 592 N.W.2d 798 (Mich. Ct. App. 1999). As the Third Circuit observed in *Wecht*, 537 F.3d at 238, “[w]e cannot reconcile the Supreme Court’s conclusion that the public has the right to see the process in which this power is exercised (*Richmond Newspapers*) and to see the process that selects those who will exercise the power (*Press-Enterprise I*), with the conclusion that the public has no right to know who ultimately exercises this power.”

Moreover, in 2002 this Court adopted a new subdivision 27.09 of Rule 27. Under that subdivision, jury lists are deemed “presumptively open to the public,” and an order allowing their closure can be granted only when “a compelling reason” exists. Mo. Ct. R. 27.09(a). Although the subdivision has yet to be interpreted by any Missouri court, other courts have found that, when the First Amendment right of access applies, the “mere generalized privacy concerns” of jurors do not constitute a sufficient reason to close a jury list. *Wecht*, 537 F.3d at 240 (internal quotations omitted). Something more is required, such as “a credible threat of jury tampering,” or “a risk of personal harm to individual jurors.” *In re Globe Newspaper Co.*, 920 F.2d 88, 97 (1st Cir. 1990).

II. Press access to jury lists informs the public and enhances confidence in the judicial process.

Compared with America's earlier days, there has been a marked decline in public attendance in the judicial process. *See Richmond Newspapers*, 448 U.S. at 572-73. Because people now acquire information about trials "chiefly through the print and electronic media," there is support for the press's "claim of functioning as surrogates for the public" in the courtroom. *Id.* In line with the press's status as "surrogate," for the vast majority of the public to learn the members of a jury, they must rely on the press publishing such information. If the press, however, fails to gain access to such information, the public is necessarily left in the dark as to the identities of those responsible for determining the guilt of the criminally accused. Such a scenario stands to have a negative impact on the American democratic system, for "justice cannot survive behind walls of silence." *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966).

When the press serves as the public's surrogate, it performs the additional "function of holding government officials accountable for their conduct of the public's business." 1 Lee Levine et al., *Newsgathering and the Law* § 1.04[2] (4th 2011). This ability of the press to "check" government power is often viewed as a way of increasing public confidence in the judicial system. *See generally In re Oliver*, 333 U.S. 257, 270 (1948). In this area, numerous courts have recognized the benefit of affording the press access to jury lists. *See Wecht*, 537 F.3d at 239 ("Public knowledge of . . . juror[] identities is desirable in part because it can deter . . . corruption and bias."); *In re Globe Newspaper Co.*, 920 F.2d at 94 ("It would be . . . difficult to inquire into [instances of

juror bias and a lack of diversity amongst jurors] . . . if names and addresses were kept secret.”); *State ex rel. Beacon Journal Publ’g Co.*, 98 Ohio St. 3d at 158, 2002-Ohio-7117, 781 N.E.2d at 194 (“Post-verdict interviews may serve to uncover juror misconduct or provide insight on systemwide problems . . .”).

In line with its role as surrogate, the press has repeatedly exposed juror misconduct. In 2006, for instance, the *Chicago Tribune* revealed that two jurors in the corruption trial of former Illinois Governor George Ryan had concealed previous arrest records. Matt O’Connor et al., *Judge Ousts Two Jurors: Alternates Eyed to Avert Ryan Mistrial*, CHI. TRIBUNE, March 28, 2006, http://articles.chicagotribune.com/2006-03-28/news/0603280148_1_two-jurors-excused-jury-selection. In another instance, the *Miami Herald* exposed that jurors had been bribed in drug cartel cases. Toni Locy, *Covering America’s Courts: A Clash of Rights* 148 (2013).

Relator has requested a copy of the jury list from *State of Missouri v. Michael L. Johnson* to investigate a lead that a juror may have known a party involved in the case. In other words, Relator seeks to uncover misconduct that could have affected the fairness of the judicial process. Surely if such allegations were permitted to go uninvestigated, the public’s confidence in the judicial system would be shaken. With the potential misconduct exposed, however, existing suspicion stands to be ameliorated and public confidence restored.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully urge this Court to grant Relator’s petition for a writ of prohibition.

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Certificate of Service

The undersigned certifies that a copy of the foregoing was filed electronically on
and served upon all counsel of record on September --, 2015. Also on September --,
2015, a copy of the foregoing was sent by first class mail to:

The Honorable Jon Cunningham
St. Charles County Circuit Court
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