



*Buzbee v. Journal Newspapers*, 297 Md. 68 (1983); *News American v. State*, 294 Md. 30 (1982) (all approving leave to intervene for the purpose of asserting access rights)). Similarly, the recent rules governing public access to court records also contemplate that persons or entities that are not parties to a case may intervene for purposes of moving to assert rights of access. See Md. Rule 16-1009(a)(1) (persons who may move to inspect court records include “a person who has been permitted to intervene as a party”). More specifically, the Court of Special Appeals has recognized a right to intervene for the precise relief sought here – a motion for access to juror information, filed while the jury is deliberating. *Hearst Corp. v. State*, 60 Md. App. 651 (1984).

**B. THE JURORS’ NAMES SHOULD BE RELEASED PURSUANT TO THE APPLICABLE MARYLAND RULES**

**1. Juror Information Must Be Released Unless the “Interests of Justice” Require Otherwise**

Before discussing the relatively new provisions of the Maryland Rules applicable to this situation, it is important to note that the precise issue raised in this Motion has arisen once before in Maryland, but was not formally decided. In *Hearst Corp. v. State*, 60 Md. App. 651 (1984) the trial court sealed the court record. Several news organizations moved to intervene in a criminal trial, while the jury was deliberating, for the purpose of seeking access to the names and addresses of the jurors. The trial judge denied the motion on the procedural ground that it found no right to intervene in those circumstances. The merits of the access issue was mooted shortly thereafter because the State apparently provided the news organizations with the information they were seeking. *Id.* at 654. The Court of Special Appeals, therefore, only addressed the procedural question of intervention, and found that the trial judge had erred by denying intervention. However, it is noteworthy that the Court found a right to intervene on the grounds

that the relief the news organizations sought implicated rights under the First Amendment and common law. *Id.* at 657-59.

More recently, the Maryland Rules applicable to this issue have been revised. Rule 16-1004(b)(2) governs the issue of access to identifying information about trial jurors. Most relevant here, Rule 16-1004(b)(2)(B) provides a right of access to the names and zip codes of the addresses of jurors once the jury is sworn, which may be obtained from the “custodian” (presumably the court clerk), “unless the trial judge orders otherwise.” The Rule does not on its face provide any standard to be utilized by trial judges when deciding whether to bar access.

In addition, Rule 16-1004(b)(2)(C) creates a right of access to a somewhat broader universe of identifying information that is available only from the trial judge; although, exactly at what point in time that right attaches is somewhat less clear. The Rule speaks to the service of a “source pool of qualified jurors”, but the determination of whether to release any information concerning jurors on a particular jury list remains vested in the trial judge, rather than the court’s administrative judge. Movants submit that the most reasonable construction of this Rule is to authorize the release of this larger pool of information about individual jurors on a jury list once that jury has completed its service. To construe the Rule otherwise appears to be arbitrary and would likely raise constitutional questions, because there would appear to be no reason why access to information about jurors in any particular case should be a function of the completion of some other wholly unrelated trial or trials.

Rule 16-1004(b)(2)(C) does provide specific criteria to guide trial judges: juror information must be released “unless, in the interest of justice, the trial judge determines that this information remain confidential in whole or in part.” This standard is quite similar to the one contained in the federal statute governing jury selection in federal courts and a number of other

states. 28 U.S.C. § 1863(7); *In re Globe Newspaper*, 920 F.2d 88, 91-2 (1<sup>st</sup> Cir. 1990) (interpreting the federal “interests of justice” standard for rendering juror information confidential); *Valentine v. State*, 396 So.2d 15, 17 (Miss. 1981). No matter how these Rules are construed, it is clear that at a minimum they presumptively authorize access to the name and zip codes of the jurors in this case once they are discharged, and most likely to the larger body of information set forth in Rule 16-1004(b)(2)(C).

Taken together, these Rules embody principles developed by courts that have addressed this issue in the decades since the Supreme Court’s decision in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) formalized rights of access to criminal trial proceedings generally. Like Rule 16-1004(b)(2)(B), the clear majority of authorities in other jurisdictions have recognized a right of access to juror information – typically both names and addresses – that attaches at the latest when a jury is sworn. *See, e.g., United States v. Wecht*, 537 F.3d 222, 235 (3d Cir. 2008) (the “experience and logic” test establishes the existence of a presumptive First Amendment right of access to obtain the names of both trial jurors and prospective jurors prior to empanelment of the jury); *In re Globe Newspaper*, 920 F.2d 88, 97 (1<sup>st</sup> Cir. 1990) (holding on non-constitutional grounds that a right of access exists to the names and addresses of jurors); *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4<sup>th</sup> Cir. 1988) (“We think it no more than an application of what has always been the law to require a district court, upon the seating of the panel of a jury and alternates, if any, which will hear a case, to release the names and addresses of those jurors who are sitting, as well as those veniremen and women who have attended court but have not been seated for one reason or another.”); *In re Bay City Times*, 143 F. Supp. 2d 979 (E.D. Mich. 2001); *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007); *State ex rel. Beacon Journal Publ’g Co. v. Bond*, 781 N.E.2d 180, 192 (Ohio 2002); *People v. Mitchell (In re Juror Names)*, 592

N.W.2d 798 (Mich. App. 1999). Some of these cases, however, recognize that the presumption of access may be “stronger” once the jury is discharged. *In re Globe Newspaper*, 920 F.2d at 91. Another related line of cases only explicitly recognizes a right of access once a verdict has been announced. Some do not reach the reach the question of whether a right might attach earlier in the trial proceedings, while some hold that it does not attach at any earlier point. *See United States v. Black*, 483 F. Supp. 2d 816 (N.D. Ill. 2007); *Forum Commc’n Co. v. Paulson*, 752 N.W.2d 177 (N.D. 2008); *Gannett Co., Inc. v. State*, 571 A.2d 735 (Del. 1989). Either way, these cases support the relief sought here since these movants are not seeking any information prior to the jury’s discharge.

Read as a whole, the relevant provisions of Rule 16-1004 seem to adopt a middle ground within this body of law, all of which is generally favorable to post-verdict public access. The applicable Maryland Rule recognizes a right that attaches at the beginning of a trial, and indeed does not even presumptively require the permission of the trial judge. However, that right grows stronger once a juror’s service is completed with respect to the scope of information available, and also with respect to the findings required to deny access. Given that these Movants only seek access once the jury in this case is discharged, they submit that the “interests of justice” test is the appropriate standard to apply here.

2. **The “Interests of Justice” Do Not Favor Post-Verdict Confidentiality in this Case**

With respect to interpreting the “interests of justice” standard, the First Circuit’s opinion in *In re Globe Newspaper* is particularly instructive. The Court there discussed extensively the analogous “interests of justice” standard contained in both the federal jury selection statute and parallel rules within the federal courts of Massachusetts and several other states. *See also Forum*

*Comm'n Co.*, 752 N.W.2d at 183 (relying on *Globe Newspaper* to explicate an “interests of justice” standard). The analysis employed in *Globe Newspaper* is especially relevant given that the Court of Special Appeals in *Hearst* recognized that this issue at least potentially raises constitutional and related questions.

The First Circuit explained that “[w]ere we dealing with a matter of general trial procedure, we might construe the phrase ‘if the interests of justice so require’ as tantamount to conferring upon each district judge virtually unbridled discretion to do as he or she thinks best. But a decision to impound the names and addresses of jurors is not an ordinary procedural matter.” *Global Newspaper*, 920 F.2d at 93. Rather, “[w]ithholding the names of trial jurors from press or public, after the trial has terminated, involves a clash of constitutionally protected interests”, including “the press’s First Amendment right of access to criminal trials.” The Court noted some of the benefits flowing from access to juror identities, including:

Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system. It is possible, for example, that suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups. It would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret. Furthermore, information 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.

*Id.* at 94. For all these reasons, permitting judges to use “unbridled discretion” in applying the “interests of justice” standard would, therefore, raise “a substantial constitutional issue.” Instead, consistent with the principle of avoiding the need to reach constitutional questions where possible, *Globe Newspaper* concluded that “it is altogether reasonable to construe the § 10(c) interests-of-justice exception as contemplating the withholding of juror identities only upon a

finding of exceptional circumstances peculiar to the case.” *Id.* at 97. It noted the courts of several other states had reached the same conclusion. *Id.*

Turning to what might constitute “exceptional circumstances, the Court emphasized that “in a democracy, criminal trials should not, as a rule, be decided by anonymous persons.” *Id.* at 91. Thus, “[s]uch circumstances include a credible threat of jury tampering, a risk of personal harm to individual jurors, and other evils affecting the administration of justice, but do not include the mere personal preferences or views of the judge or jurors.” *Id.* at 97. Generally, the Court recognized, as do implicitly the Maryland Rules, that “[n]o doubt stronger reasons to withhold juror names and addresses will often exist *during* trial than *after* a verdict is rendered.” *Id.* at 91. Specifically, the Court held that the fact that some jurors might be exposed to unwanted, post-trial inquiries from the press is not a legitimate reason to deny access, particularly once the trial is over. *Id.* (“while privacy concerns following a publicized trial are real-and may understandably include some nervousness about personal security-these unfocused fears must be balanced against the loss of public confidence in our justice system that could arise if criminal juries very often consisted of anonymous persons”).

Many other courts have reached the same conclusion. *See, e.g., United States v. Wecht*, 537 F.3d 222, 240 (3d Cir. 2008) (The participation of jurors “in publicized trials may sometimes force them into the limelight against their wishes,” but “[w]e cannot accept the mere generalized privacy concerns of jurors” as a sufficient reason to conceal their identities in every high-profile case”). Notably, the Fourth Circuit applied a very similar analysis to the federal jury selection statute, though it may have even more explicitly recognized a First Amendment basis for requiring access to juror names. *In re Baltimore Sun Co.*, 841 F.2d at 76 (“We recognize the difficulties which may exist in highly publicized trials such as the case being tried here and the

pressures upon jurors. But we think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.”).

Applied to the circumstances of this case, these principles strongly favor release of, at a minimum, the jurors’ names and zip codes, and any other information that the applicable Rule would permit. This is not a case in which there is any serious reason to fear for juror safety, and, while Movants are not aware of any evidence that jury tampering was ever a concern, such concerns would be irrelevant in any event once the trial is concludes. Not surprisingly, the cases in which greater juror anonymity has been recognized typically involve gangs, organized crime, drug lords, etc. in which concerns about the physical safety of jurors and/or potential threats to the integrity of the judicial process are far more apparent. *See, e.g., United States v. Calabrese*, 550 F.Supp.2d 680 (N.D. Ill. 2007).

By contrast, the values served by access to this information are at their peak in a prosecution of a public official. Suspicions about the political and personal biases of jurors are typically at their highest in such cases, and an aura of court-imposed secrecy surrounding them only fuels such concerns and may therefore affect public confidence in any verdict. Indeed, as a general matter, the notion that “exceptional circumstances” exist merely because this or any similar case is “high profile” would turn the presumption of access on its head by only recognizing access in those cases where the public is least likely to actually be interested in exercising their rights. Rather, courts have recognized that presumptions of access should be at their highest where criminal proceedings involving public officials are involved. *See, e.g., In re Nat’l Broad. Co.*, 635 F.2d 945, 9520 (2d Cir. 1980) (holding, in the prosecution of a Congressman, that the presumption in favor of permitting public inspection and copying “is

especially strong in a case like this[.]”); *In re Nat'l Broad. Company*. 653 F.2d 609, 614 (D.C. Cir. 1981) (“the nature of the trial itself is a factor which provides strong support for the application... [T]his case involves issues of major public importance [and] a high government official.”).

Finally, there are several pragmatic considerations that favor release of the jurors’ names as soon as the jury is discharged here. Providing some identifying information about this jury is not likely to be nearly as substantial an intrusion into any juror’s privacy as might be feared. This is not a case where hordes of national and international media have descended upon the courthouse. *See, e.g. United States v. Black*, 483 F. Supp.3d 618, 621 (N.D. Ill. 2007) (“400 media personnel representing close to 60 organizations have sought and received media accreditation in anticipation of this trial. Organizations such as the British Broadcasting Corporation, Agence France Presse, CTV, Inc. (Canadian Television), The Times of London are accredited and have come from around the globe to cover these proceedings.”). While this case is obviously of great importance to the citizens of Baltimore, there are, at most, a half-dozen news organizations that might be interested in interviewing jurors, and any individual juror is likely to be contacted by an even smaller number of journalists. Particularly since any juror is free to say “no”, any potentially unwanted intrusion is not nearly as substantial as might be the case elsewhere.

Moreover, withholding the jurors’ names, even temporarily, may actually result in more inconvenience to jurors. The jury has not been sequestered, and given that awareness of this trial is wide-spread, the jurors are already likely to be far less anonymous than in an ordinary criminal or civil case. There are likely any number of family, friends, neighbors, co-workers, etc. who know who they are. If their names are not released, enterprising reporters will be incentivized to

cast as wide a net as possible to attempt to identify them, which jurors might find more discomfoting than a simple phone call or even a knock on the door. Therefore, for several reasons, Movants respectfully submit that effort to temporarily delay release of jurors' names would not be appropriate in these circumstances. *See, e.g., United States v. Espy*, 31 F. Supp. 2d 1 (D.C. Cir. 1998); *Sullivan v. Nat'l Football League*, 839 F. Supp. 6 (D. Mass. 1993).

As a policy matter, such delay is inconsistent with the principle that access should generally be contemporaneous. Many trial participants, such as witnesses, may find some attention discomfoting, but that is not typically a reason to delay access to information about judicial proceedings. *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (even a "minimal delay" in making judicial records public "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself"). Juror's perspectives on the trial are also more likely to be fresh in their minds and less susceptible to the influences of other persons if access is provided upon their discharge. Moreover, for the practical reasons discussed above, delaying release may actually do more harm than good from the perspective of some individual jurors.

For all these reasons, Movants respectfully request that the Court release the jurors' names, zip codes, and any other information permitted by Rule 16-1004.

## **II. THE FIRST AMENDMENT ALSO REQUIRES RELEASE OF THE JURORS' NAMES**

As previously discussed, most courts to address the question have concluded that access to juror names is one incident of the broader right of all aspects of criminal proceedings and related records. The Third Circuit's opinion in *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008) is the most recent and comprehensive example, but many other courts have has well. *See, e.g., Forum Commc'n Co. v. Paulson*, 752 N.W.2d 177, 185 (N.D. 2008) (citing cases). Generally, the Supreme Court has established a two-part test to determine whether access to any

particular aspect of judicial proceedings is subject to a First Amendment analysis: whether “experience” demonstrates that access has historically been afforded, and whether “logic” dictates that access would further the policies supporting open proceedings. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10; see also *Baltimore Sun v. Thanos*, 92 Md. App. 227, 233-35 (1992); *Hearst Corp.*, 60 Md. App. at 658. Access to juror names satisfies both prongs of this test. Historically, the identities of jurors were always well-known and there is no tradition of secrecy surrounding them. *Wecht*, 537 F.3d at 235-37; *In re Baltimore Sun Co.*, 841 F.2d at 74. And for all the reasons previously discussed, access to juror names fulfills the broader purposes of facilitating public monitoring of and confidence in judicial proceedings. *Wecht*, 238-39.<sup>1</sup>

Any First Amendment right may only be overcome by a compelling state interest and relief that is narrowly tailored to address that interest, *Thanos*, 92 Md. App. at 235, a standard that movants submit could not be met in this case. However, the Court of Appeals strongly encourages trial courts to avoid deciding constitutional questions where an issue may be resolved on other grounds. *VNA Hospice of Maryland v. Dept. of Health and Mental Hygiene*, 406 Md. 584, 604 (2008) (“This Court has emphasized, time after time, that the Court’s strong and established policy is to decide constitutional issues only when necessary.”) (citations omitted). For all the reasons previously discussed, Movants submit that the information they request

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<sup>1</sup> The Fifth Circuit, in *United States v. Brown*, 250 F.3d 907 (5<sup>th</sup> Cir. 2001), disagreed with its three sister Circuits on the scope of access rights in this area. *Brown* has not been followed outside the Fifth Circuit, and the presumptions created by the Maryland Rules strongly suggest that *Brown* would not be followed in this state as well. Moreover, *Brown* was a case that actually did involve genuine concerns about jury tampering, intimidation, and harassment post-trial, because several of the defendants had a demonstrated history of attempting to improperly influence criminal proceedings. 250 F.3d at 921-22.

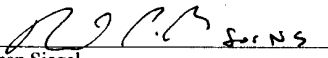
should be provided without the need to address the broader constitutional question otherwise presented here.

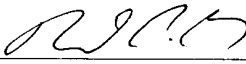
### CONCLUSION

For the foregoing reasons, proposed Movants respectfully request that the Court (1) grant their motion to intervene, (2) release the jurors' names and zip codes and (3) release any other identifying information permitted by the Maryland Rules.

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Respectfully Submitted,

  
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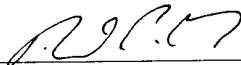
CERTIFICATE OF SERVICE

I hereby certify that on the 20<sup>th</sup> day of November 2009, I caused to be served by hand delivery a copy of the foregoing Memorandum of Law in Support of Motion to Intervene and for Release of Juror Names upon:

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