UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 14-10363-RGS
BARRY J. CADDEN,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF TRUSTEES OF BOSTON UNIVERSITY TO INTERVENE AND TO UNSEAL JUROR LIST

INTRODUCTION

Under controlling precedent in this Circuit, the names and addresses of jurors in criminal trials must be made public after a verdict is rendered, absent the "exceptional" circumstance of a "significant threat to the judicial process itself." *U.S. v. Hurley*, 920 F.2d 88, 91 (1st Cir. 1990). "In a democracy," the First Circuit has held, "criminal trials should not, as a rule, be decided by anonymous persons." *Id.*

Nearly three months have passed since the jury rendered its verdict in this case of profound national importance. Yet, without explanation, the Court has declined to release the juror list to members of the press and the public, including to WBUR, the public radio station owned and operated by Intervenor Trustees of Boston University (referred to hereinafter as "WBUR"). To advance its reporting on this important case, WBUR moves to intervene in this action and to unseal the juror list, and respectfully submits this memorandum of law in support of that motion.

The Government does not object to the relief requested in WBUR's motion. The Defendant has represented through counsel that he takes no position on the matter.

FACTS

The jury entered its verdict in this case on March 22, 2017. (Doc. No. 990). Like the trial itself, the verdict attracted widespread media attention both nationally and locally, in part because the defendant was acquitted on the most serious charges against him. Attached hereto as Exhibits 1-5 are a collection of news articles concerning the verdict.

On April 20, 2017, the Court received a letter from Hearst Stations, Inc., the owner of television station WCVB, making a "formal request" for release of the juror list. (Ex. 6). As far as the docket reflects, the Court has taken no action in response to the letter.

WBUR, through its Senior Reporter David Boeri, covered the trial in this matter closely. On May 15, 2017, WBUR broadcast a radio story and accompanying online article reporting that the jurors had recorded numbers on the verdict form along with each of the "not guilty" verdicts. (Ex. 7).[1] The numbers appear to reflect the results of votes taken at some time during the deliberation process. WBUR's report quoted several legal experts who questioned whether, in light of the numbers, the jury had actually been unanimous in rendering its not guilty findings — and therefore whether any verdict had been reached on those counts at all. The report stated that WBUR had been unable to contact the jurors to ask them about the case because the Court had not yet released the juror list. In response to WBUR's request for the list, the clerk has informed the station that she does not know if, or when, the document will be released. (Ex. 8).

[1] Audio of the WBUR radio story may be heard at http://www.wbur.org/news/2017/05/15/necc-cadden-jury-verdict-form (last visited June 7, 2017).

ARGUMENT

I. CONTROLLING PRECEDENT REQUIRES THE COURT TO RELEASE THE JUROR LIST.

Under controlling precedent, the juror list must be unsealed and provided to WBUR.[2] The First Circuit held long ago that "absen[t] . . . particularized findings reasonably justifying non-disclosure," juror names and addresses "must be made public." *United States v. Hurley*, 920 F.2d 88, 98 (1st Cir. 1990), citing *United States v. Doherty*, 675 F.Supp. 719 (D. Mass. 1987). To justify complete impoundment of juror names "after the trial has ended, the court must find a significant threat to the judicial process itself," such as a determination "that the personal safety of the jurors would . . . be compromised by revealing their identities." *Hurley*, 920 F.2d at 91. No such finding has been made here; thus, the list must be released.

In *Hurley*, the district court denied a request by the *Boston Globe* for post-verdict access to the juror list because the jurors "explicitly expressed a desire that their names and addresses not be revealed to the press," and in the court's view, interviews about the content of jury deliberations would "demean the administration of justice." *Hurley*, 920 F.2d at 90 n. 1. On appeal, the First Circuit held this refusal was improper under the terms of Section 10(c) of the District of Massachusetts Plan for Random Selection of Jurors, (now embodied in § 10(a) of the document) (the "Plan"), which provided that a court could order the names of jurors to remain confidential after they "have appeared, or failed to appear, in response to the summons" only if

[2] Intervention for the limited purpose of seeking to unseal court records is a recognized method for a media entity to vindicate the public's right of access to criminal proceedings. *In re Boston Herald, Inc*., 321 F.3d 174, 177 (1st Cir. 2003) (noting allowance of media entity's motion to intervene in criminal case for purpose of pursuing access request); *U.S. v. DiMasi,* No. 09-cr-10166-MLW, Doc. 378 (March 16, 2011), at 9 (allowing motion of *Boston Globe* to intervene "to the extent that the court is unsealing" portions of an affidavit on file with the court); *but see U.S. v. Finneran*, No. 05-10140, Doc. 22 (denying press motion (opposed by both parties) for access to unfiled discovery based in part on conclusion that media entity had no right to intervene in a criminal case where there was no underlying right of access).

the "interests of justice so require." The First Circuit construed the "interests of justice" standard in the Plan narrowly, "as requiring that the trial court find specific and convincing reasons why, in the particular case, the juror identities are required to be withheld," a result that should be realized "only in an exceptional case." *Id.* at 93.

The *Hurley* court construed the "interests of justice" language in this manner to avoid conflict with the First Amendment, which "protects the right of the press and the public to attend criminal proceedings, together with the 'right to gather information.'" *Hurley*, 920 F.2d at 94, quoting *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972), *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). The right of access to criminal trials and documents is "rooted in the historic common law public character of criminal proceedings since the Norman Conquest in England and the United States Constitution as an 'indispensable attribute of an Anglo-American trial.'" *Id.,* quoting *Richmond Newspapers,* 448 U.S. at 569. It also helps ensure the proper functioning of courts, by, among other things:

> assuring that proceedings are conducted fairly; discouraging perjury, misconduct of participants, and biased decisions; prophylaxis as an outlet for community hostility and emotion; ensuring public confidence in a trial's results through the appearance of fairness," and "inspiring confidence in judicial proceedings through education regarding the methods of government and judicial remedies.

Hurley, 920 F.2d at 94. *See also Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986) (courts must consider the "two complementary considerations" of "history," or whether "the place and process have historically been open to the press and general public," and "logic," or "whether public access plays a significant positive role in the functioning of the particular process in question," in deciding whether First Amendment access right attaches).

"Knowledge of juror identities," the *Hurley* court continued, serves many of these salutary purposes. It "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." Notwithstanding the district court's hostility to press questioning of jurors after a verdict, the court identified several beneficial "avenues of inquiry" that might be pursued, including "[j]uror bias *or confusion*," as well as "jurors' understanding and response to judicial proceedings." *Id.* at 94 (emphasis supplied).[3]

Accordingly, the *Hurley* Court imposed a demanding standard: to justify the withholding of juror names and addresses after a verdict is rendered, "the court must find a significant threat to the judicial process itself," such as a determination "that the personal safety of the jurors would . . . be compromised by revealing their identities," or the likelihood of "other evils, such as jury tampering." *Hurley*, 920 F.2d at 91, 99. Such a determination must be supported by "particularized findings reasonably justifying the non-disclosure," failing which "the juror names and addresses must be made public." *Id.* at 98.

[3] Access to juror identities is also a matter of longstanding tradition in the Commonwealth, as recently observed by the Supreme Judicial Court in *Com. v. Fujita*, 470 Mass. 484, 486 (2015) (holding press has right of access to jury list under Massachusetts common law). "For example, jury selection in the 1770 prosecutions of the British soldiers charged with the Boston Massacre was open to the public, and the identities of the jurors who acquitted the soldiers were known to the community. See 3 Legal Papers of John Adams 17–19, 49 n. 1, 99–100 (L. Wroth & H. Zobel eds. 1965). Similarly, in the 1806 trial of Thomas Selfridge, a prominent Boston attorney accused of shooting and killing the son of a political rival in the middle of the day on State Street, the jurors were drawn and publicly announced at the trial — the first being Paul Revere (who went unchallenged) — and were listed in the publicly available reports of the proceeding. See, e.g., Trial of Thomas O. Selfridge, Att'y at Law, Before the Hon. Isaac Parker, Esquire, For Killing Charles Austin on the Public Exchange, in Boston, August 4th, 1806, at 9 (Russell & Cutter, Belcher & Armstrong, Oliver & Munroe, and William Blagrow, 1807) (juror empanelment on Dec. 23, 1806). Similarly, in the 1849 trial of Professor John W. Webster for the murder of Dr. George Parkman (one of the most intensely followed and reported murder trials in the United States at the time), the jurors' names were publicly drawn at the beginning of the trial and published in special editions of the newspapers of the time. See, e.g., Trial of Professor John W. Webster for the Murder of Dr. George Parkman in the Medical College, at 6 (Boston Herald Steam Press, 1850) (listing names of jurors selected for trial)." *Id.*

Here, there have been no findings justifying the impoundment of the juror list. Nor, to WBUR's understanding, is there any indication that releasing the names of the jurors would compromise their safety or lead to any of the "other evils" contemplated in *Hurley*. Accordingly, the list must be released.

The Court's delay in releasing the juror list has significantly burdened the public's First Amendment right of access. "As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976)); *see also Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers) (where "suppressed information grows older . . . [o]ther events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable."); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one or two day delay [in access to judicial records] impermissibly burdens the First Amendment"). Although courts in this district have justified a delay of a few days to a week to permit jurors to resume their normal lives before receiving calls from the press, no decisions have postponed disclosure for three months. *See, e.g., United States v. DiMasi,* 795 F.Supp.2d 115 (D.Mass. 2011) (postponing disclosure for one day); *United States v. Sampson,* 297 F.Supp.2d 348 (D.Mass. 2003) (postponing disclosure for seven days). As the memories of jurors fade, continued delay threatens to frustrate the important salutary purposes of access to juror identities, and interferes with the First Amendment right to gather the news.

CONCLUSION

For the foregoing reasons, Intervenor Trustees of Boston University, through its radio station WBUR, respectfully requests that its motion be granted, and that it be provided with access to the juror list in this case as soon as possible.

TRUSTEES OF BOSTON UNIVERSITY,

By its attorney,

/s/ Jeffrey J. Pyle

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CERTIFICATE OF SERVICE

I, Jeffrey J. Pyle, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-participants on June 9, 2017.

/s/ Jeffrey J. Pyle
Jeffrey J. Pyle