No. 18-___

IN THE

Supreme Court of the United States

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC. AND JOLENE CLEAVER,

Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

KAITLYN CONLEY,

Defendant.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an application to a trial court by the press, as a surrogate for the public, in exercising its constitutionally required ability to be heard in opposition to a denial of the presumptive First Amendment right of access to *voir dire* questionnaires used to select the jury in a controversial murder prosecution may be denied by the failure of state criminal procedural rules to authorize standing for that purpose?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of the parties to the proceeding in the New York Court of Appeals.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that Petitioner GateHouse Media New York Holdings, Inc., is a corporation duly incorporated under the laws of the State of Delaware. It has no subsidiaries. Its ultimate corporate parent is New Media Investment Group Inc., a publicly held corporation that owns all of its stock.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The Order Dismissing Leave by the New York Court of Appeals entered on February 13, 2019, is reported as 32 N.Y.3d 1203 (2019) and included in the Appendix ("App.") hereto. App. 1a. The New York State Supreme Court, Appellate Division, Fourth Department's companion orders entered on October 5, 2018, are reported as 165 A.D.3d 1602 (4th Dep't 2018) and 165 A.D.3d 1604 (4th Dep't 2018), and included in this Appendix. App. 2a-7a. The trial court's Decision and Order entered on December 19, 2017, is not reported but is included in the Appendix. App. 8a-25a. The trial court's initial Order dated November 8, 2017, is not reported but is included in the Appendix. App. 26a-27a.

JURISDICTION

The order of the New York Court of Appeals was entered on February 13, 2019. This Petition For Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

PRELIMINARY STATEMENT

> *"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are*

prohibited from observing." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

This case presents a foundational issue implicating the public's constitutional right of access to information concerning the operation of the criminal justice system. Petitioners *The Observer-Dispatch*, a community newspaper published in Utica, New York, and its court reporter Jolene Cleaver moved to intervene in asserting a First Amendment right of public access to the *voir dire* questionnaires relied on by the parties and the trial court to empanel the jurors in a high-profile murder prosecution. The New York Court of Appeals summarily rejected *The Observer-Dispatch*'s appeal from a denial of access to those court records, holding that the newspaper did not have standing to appeal as a matter of state criminal procedure law.[1] This ruling cannot be reconciled with this Court's longstanding recognition that the press and public must be given an opportunity to be heard before any decision is made restricting access to a criminal case. Further, by refusing to entertain *The Observer-Dispatch*'s constitutional arguments on the merits, it allows trial judges to reject transparency without consideration of controlling First Amendment standards, thereby imposing an unprecedented barrier to access that will inevitably reduce the public trust and respect fostered by an open judicial process.

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[1] The Court of Appeals' order upheld an order by the New York State Supreme Court, Appellate Division, Fourth Department holding that New York's Criminal Procedure Law did not authorize Petitioners to intervene in the underlying prosecution. 165 A.D.3d at 1603; App. 2a-5a. This issue was raised *sua sponte* by the intermediate appellate court. At no time was it raised or briefed by the parties, either in that court or the trial court.

The constitutional protections of public access are meaningless without effective means to enforce them. For this reason, a denial of access to criminal proceedings and related records can only be undertaken in accordance with the due process safeguards established under the First and Fourteenth Amendments. Both this Court and the New York Court of Appeals itself have accordingly established procedures for trial courts to follow so as to protect the press and public from arbitrary or unjustified denials of access, and so as to protect the right of those concerned to obtain expedited review, and the ability of higher courts to review such denials of access. These procedures include the right to notice and an opportunity for interested parties to object before a closure or sealing order may be entered by a trial judge. They also place on those who seek to limit the right of access the burden of justifying any limitations imposed, and require on-the-record findings of fact that warrant any restriction on public access. They necessarily reflect that a denial of public access in a criminal proceeding has an immediate, direct, and substantial effect upon the interests of the press and public. They are not gratuitous prescriptions that can be sacrificed to a legislative failure to provide a means by which to assert the First Amendment right of access, but a constitutional mandate intended to protect consideration of the public's interest in both monitoring and understanding what takes place in this nation's courtrooms by affording the press standing to intervene and appeal from sealing orders in criminal cases.

The order at issue dictates that the press, on behalf of the public it serves, has no procedural avenue to challenge – indeed, has no business challenging – denials of public access in criminal proceedings conducted in New York State's trial courts, a holding

antithetical to everything that this Court has ever said about the values of open judicial proceedings and the correlative rights of public access to court records. In shutting down access in this manner, the ruling undermines longstanding constitutional guarantees enabling the press to contest at their inception attempts to seal court records, which infringe First Amendment rights to receive information and to gather news. Without the right and ability to oppose denials of access to criminal court records at the trial court level, and to appeal such denials on an expedited basis (because news delayed is news denied), the utility of public oversight of the criminal justice system is greatly diminished at the very time it matters most.

In a series of cases beginning with its landmark decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 n.9 (1980) ("[w]hat transpires in the courtroom is public property") (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) (Douglas, J.)), and culminating in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (First Amendment right of access requires disclosure of transcript of preliminary hearing), this Court established a qualified right of public access to criminal proceedings that includes court records generated in the course of those proceedings. As a fundamental corollary, this Court has upheld the procedural right of the press and public to be heard before access to judicial proceedings and/or court records may be denied. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In the decades that have followed the above decisions, both federal and state courts have uniformly held that the presumptive constitutional access right requires standing on the part of those members of the press and public seeking to vindicate it. Until now, not a single appellate or trial court in New York State has denied

the ability of the press to intervene in a criminal case for the limited purpose of upholding the public's right of access.

In requiring a legislative enactment as a precondition to press intervention in criminal cases, the ruling appealed from nullifies the public's First Amendment access rights by adopting a strict formalism that has long been disavowed as a matter of constitutional principle. Most significantly, it has left *The Observer-Dispatch* remediless in this instance, and has thereby effectively countenanced the sealing of juror *voir dire* questionnaires – which every federal and state court to consider the question has determined are presumptively public under the First Amendment as an integral component of the jury selection process – even after the verdict was rendered in the underlying prosecution.

The destabilizing ruling of the New York Court of Appeals warrants review and reversal because it is disturbingly incorrect. If permitted to stand, it will impair the citizenry's ability to monitor the judicial process in criminal cases, which safeguards the integrity of, and promotes public confidence in, the administration of justice. Further, its effect in this case has been to prevent a professional journalist from reporting in a timely manner on the jury selection process in a murder prosecution that riveted – and divided – the local community, thereby eroding the public's First Amendment right to be informed about the operation of the criminal justice system. The importance of clarifying and reaffirming the constitutional procedural rights of news organizations to contest threshold denials of access in criminal cases – rights that have been exercised for decades by the press, on behalf of the public, throughout New York's and the nation's trial courts – cannot be overstated.

Those rights cannot be held hostage to legislative sufferance, nor can they be extinguished by legislative indifference. By insulating a denial of access from appellate review on the constitutional merits, the Court of Appeals disregarded the two hearings conducted by the trial court – in which *The Observer-Dispatch*'s right to intervene was never questioned – as if they had never occurred. The First Amendment prohibits such an outcome.

STATEMENT OF THE CASE

A. *The Observer-Dispatch*'s Application for Public Access to Juror *Voir Dire* Questionnaires In a Controversial Murder Prosecution

In April and May of 2017, the 24-year-old defendant in *People of the State of New York v. Kaitlyn Conley* was tried in County Court, County of Oneida (N.Y.) for second-degree murder based on the poisoning death of her former boyfriend's mother. The defendant worked as a receptionist in the office of the victim, who was a chiropractor. The trial, which received national press coverage and polarized the community, resulted in a hung jury.

A second jury trial began on October 12, 2017. Prospective jurors completed a "Juror Questionnaire" (N.Y.S. Unified Court System Form 140-4-13-05) as part of the jury selection process. Such questionnaires are used by the trial court "to assist the Court and the attorneys in selecting a fair and impartial jury." App. 13a. The questionnaire is intended to expedite *voir dire*, and includes such routine questions as the prospective juror's highest level of education, whether the prospective juror has ever sat on a jury before, and his/her hobbies or recreational activities. App. 23a-

25a. The *voir dire* of prospective jurors for the retrial in *People v. Conley* was conducted in open court on October 12-13, 2017, by the trial judge and parties. App. 11a.

On October 31, 2017, while the second trial was ongoing, Petitioners submitted a 10-page written application to the trial court requesting (1) immediate public access to the identities of the jurors empaneled in *People v. Conley*, and (2) that the trial court advise the jurors post-verdict and prior to their discharge that they have the right to speak to the press should they choose to do so. *The Observer-Dispatch*'s October 31, 2017, letter application did not explicitly seek an order granting intervention pursuant to any statute or court rule, but instead focused on the merits of the constitutional public access rights at stake. The application also inquired if the trial court would require additional submissions pursuant to formal motion practice. The defendant took no position on *The Observer-Dispatch*'s application, which was opposed by the District Attorney. However, neither the trial court nor the District Attorney questioned, let alone objected to, Petitioners' right to appear in the criminal proceeding and be heard in support of the First Amendment public access rights they sought to vindicate.

The trial court promptly scheduled and heard oral argument on Petitioners' public access application on November 3, 2017, without requiring formal motion practice or any further submissions from *The Observer-Dispatch*. During the hearing, Petitioners expressly limited their application to public disclosure of the *voir dire* questionnaires submitted by the empaneled jurors in *People v. Conley*. Oral argument focused on whether *The Observer-Dispatch* was entitled to these

questionnaires under the First Amendment. At no time during the hearing did either the District Attorney or the trial judge question or contest Petitioners' right to be present in the courtroom for the limited purpose of asserting the constitutional public access right at issue.

B. The Trial Court's Denial of *The Observer-Dispatch*'s Public Access Application on the Grounds Juror Names Had Been Announced During *Voir Dire* and Disclosure Would Set a "Terrible Precedent"

1. The Trial Court's Bench Ruling Denying Public Access.

During oral argument, the trial court found it significant that the jurors' names had been announced in open court during the conduct of *voir dire* and also chastised *The Observer-Dispatch*'s court reporter, Ms. Cleaver, for not being present during the lengthy *voir dire* proceedings. The trial court also expressed its concern that release of the jury names as reflected on the *voir dire* questionnaires would set a precedent requiring disclosure in future cases.

Upon completion of oral argument on November 3, 2017, the trial court ruled from the bench in denying public access to the *voir dire* questionnaires, and ordered *The Observer-Dispatch* to pay for a transcript to obtain the names of the jurors empaneled at the conclusion of the jury selection process.

C. *The Observer-Dispatch* Immediately Appeals the Trial Court's Decision Denying Public Access (Appeal No. 1)

On November 6, 2017, after two days of deliberation, the jury reached a verdict in *People v. Conley*, finding

Kaitlyn Conley not guilty of second-degree murder but guilty of first-degree manslaughter. App. 10a. On November 8, 2017, the trial court signed an Order memorializing its previous bench ruling that denied *The Observer-Dispatch*'s motion for public access to juror *voir dire* questionnaires. App. 26a-27a. *The Observer-Dispatch* filed and served its notice of appeal (App. No. 1) to New York State Supreme Court, Appellate Division, Fourth Department on that same date.

D. The District Attorney's Request for Rehearing Is Granted by the Trial Court

Despite being the prevailing party, the District Attorney sought reconsideration of the November 8, 2017, Order, and requested that the trial court conduct a second hearing. The District Attorney "ask[ed] for the opportunity to set forth, on the record, additional reasons for his opposition to the release" of the questionnaires because "he wished to supplement the proposed record on appeal[.]" App. 10a.

Over Petitioners' objections, the trial court heard additional argument by the parties on December 1, 2017. These arguments again centered on the First Amendment merits of *The Observer-Dispatch*'s application for post-verdict public access to the *voir dire* questionnaires.

E. The Trial Court's December 13, 2017, Decision and Order Denying Public Access for a Second Time

In a second order dated December 13, 2017, the trial court again denied *The Observer-Dispatch*'s motion for immediate public access to the questionnaires submitted by the empaneled jurors during *voir dire* and

reaffirmed its November 8, 2017, Order, but with certain conclusions. The trial court withheld the juror names on the grounds it had "no affirmative obligation to provide a particular journalist or news organization with information which was readily available to anyone present during a trial held in open court." App. 11a. With respect to the *voir dire* questionnaires, the trial court found that disclosure "would diminish the public's confidence in the criminal justice system" and "would have a chilling effect on the willingness" of potential jurors to serve. App. 17a. Finally, the trial court concluded, based on the District Attorney's contention and without making any specific factual findings, that "there existed a high likelihood that jury tampering, or the harassment of a juror or jurors, would occur" if the questionnaires were disclosed "while the jury in this matter was still deliberating." App. 18a-19a.

F. Petitioners' Appeal No. 2

On December 20, 2017, Petitioners filed and served their notice of appeal (Appeal No. 2) to New York State Supreme Court, Appellate Division, Fourth Department from the December 13, 2017, Order.

The entire process delineated above played out over the course of nearly sixty days without any objection whatsoever to *The Observer-Dispatch*'s right to appear in the underlying prosecution for the limited purpose of vindicating the public's First Amendment right of access to the jury *voir dire* questionnaires relied on by the trial court and parties in *People v. Conley*.

G. The Appellate Division, Fourth Department's Orders Entered on October 5, 2018, Dismissing *Sua Sponte* the Consolidated Appeal for Lack of Standing

On October 5, 2018, the intermediate appellate court issued companion rulings vacating the trial court's orders and dismissing *The Observer-Dispatch*'s appeals (Appeal Nos. 1 and 2) without reaching the constitutional merits. After reciting the extensive procedural history in the court below, which included substantial briefing by *The Observer-Dispatch* and two separate hearings conducted by the trial court, the Fourth Department held: "Although it was not raised during the proceedings on the intervenors' motion, it is well established that '[t]he Criminal Procedure Law provides no mechanism for a nonparty to intervene or be joined in a criminal case.' " 165 A.D.3d at 1603; App. 4a.

H. The New York Court of Appeals Summarily Dismisses Petitioners' Appeal For Lack of Standing

On November 28, 2018, *The Observer-Dispatch* timely petitioned the New York Court of Appeals for review of the Fourth Department's orders. Petitioners asserted that the lack of a state procedural rule for intervention cannot preclude the press and public from challenging denials of access to criminal proceedings and records and, further, that the trial court's sealing of the *voir dire* questionnaires in *People v. Conley* violated the First Amendment.

The Court of Appeals summarily dismissed the appeal on February 13, 2019, on the ground that *The Observer-Dispatch* "does not have standing" to appeal

from a denial of its First Amendment right of access in a criminal proceeding. App. 1a.

REASONS FOR GRANTING THE PETITION

I. THE NEW YORK COURT OF APPEALS' DENIAL OF PRESS STANDING CONFLICTS WITH THIS COURT'S PRECEDENT BY NULLIFYING THE PROCEDURAL REQUIREMENTS ESTABLISHED FOR PROTECTION OF THE PUBLIC'S FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL RECORDS IN A CRIMINAL PROCEEDING

As this Court has emphasized, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted[.]" *Richmond Newspapers v. Virginia*, 448 U.S. at 575. In a distinguished line of cases, the Court has recognized a constitutional presumption of public access to criminal court proceedings – including specifically jury selection and the information traditionally disclosed in such proceedings.[2] *Id.* at 580-81 (order closing

[2] Petitioners were denied public access to the questionnaires used in selecting the jury in the underlying murder prosecution, judicial documents to which the public's First Amendment access right unquestionably attaches. As summarized by an appellate court in the District of Columbia, "[e]very court that has decided the issue has treated jury questionnaires as part of the *voir dire* process and thus subject to the presumption of access." *In re Access to Jury Questionnaires*, 37 A.3d 879, 885-86 (App. D.C. 2012) (held, First Amendment required public disclosure of juror questionnaires notwithstanding trial court's written representation to jurors that they would be "kept in confidence, under seal,

criminal trial invalid under First Amendment); *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608-11 (statutorily mandated closure of portions of trial

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not accessible to the public or media"); *see also ABC, Inc. v. Stewart*, 360 F.3d 90, 93 (2d Cir. 2004) (contemporaneous media access to *voir dire* is "a vital component of the First Amendment right of access"); *In re South Carolina Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir. 1991) (applying presumption of access to jury questionnaires); *United States v. Shkreli*, 260 F. Supp. 3d 257, 259-60 (E.D.N.Y. 2017) ("Press coverage of *voir dire*, no less than coverage of opening statements or the cross examination of a key witness, contributes to the fairness of trials."); *In re Washington Post*, 1992 U.S. Dist. LEXIS 16882, at *4 (D.D.C. July 23, 1992) (held, First Amendment granted the public a right of access to completed jury questionnaires); *United States v. McDade*, 929 F. Supp. 815, 817 n.4 (E.D. Pa. 1996) (recognizing that First Amendment right of access to *voir dire* extends to written questioning of prospective jurors); *United States v. Bonds*, 2011 U.S. Dist. LEXIS 155885, at *9 (N.D. Cal. Mar. 14, 2011)) ("Written jury questionnaires are meant to help facilitate the jury selection process by assisting the attorneys and the Court during oral *voir dire* and actual selection of the jury."); *Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669 (2d Dep't 1990) ("[Q]uestionnaires completed by the petit jurors in this criminal action were an integral part of the *voir dire* proceeding."); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d. 146, 152 (Ohio 2002) ("Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the *voir dire* process."); *Bellas v. Superior Court*, 85 Cal. App. 4th 636, 645, 102 Cal. Rptr. 2d 380, 386 (Cal. Ct. App. 2000) ("the content of juror questionnaires [is] publicly accessible" unless the presumption is outweighed by a compelling interest and the "limitation on access is tailored as narrowly as possible"); *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 861, 221 P.3d 1240, 1248 (Nev. 2009) ("[T]he use of juror questionnaires does not implicate a separate and distinct proceeding . . . . [It] is merely a part of the overall *voir dire* process[.]"); *Forum Comm'cs Co. v. Paulson*, 2008 ND 140 (N.D. 2008) (holding that use of jury questionnaires "serves as an alternative to oral disclosure of the same information in open court").

involving sex offenses against minors violates First Amendment); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("*Press-Enterprise I*") ("since the development of trial by jury, the process of selection of jurors has presumptively been a public process"); *Press-Enterprise II*, 478 U.S. at 13 (First Amendment right of access attaches to preliminary hearing in criminal case). In each of these cases, media representatives intervened in state criminal trial courts to contest a denial of public access.

Leave to appeal is warranted to permit this Court to clarify – contrary to what the New York Court of Appeals held in this case, in derogation of the above authority and its own longstanding precedent – that the failure of New York's procedural law to authorize intervention does not override or displace the press and public's constitutional right to be heard in state trial courts in opposition to the sealing of judicial documents in criminal cases. This Court's decisions, policy considerations, and fundamental due process rights to notice and an opportunity to be heard establish that the press has standing to challenge entry of an order restricting access which has been entered or requested in a criminal proceeding. Indeed, throughout constitutional public access jurisprudence, and in a variety of contexts, both state and federal courts have repeatedly held that news organizations are entitled to intervene for the limited purpose of protecting the public's constitutional rights of access to criminal proceedings and related documents, and are authorized to appeal from any denials of access.

In light of this unwavering authority, the New York Court of Appeals' order dismissing Petitioners' appeal based on the lack of a statutory mechanism to assert the constitutional right of public access presents a

stark anomaly. Further, statewide application of the ruling by New York's trial courts would result in closing the courthouse doors on the press and public's First Amendment rights of contemporaneous access to court proceedings and judicial documents, amounting to a summary deprivation of the due process protections long upheld as necessary to safeguard those rights, to the detriment of an informed public. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("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."); *In re San Juan Star Co.*, 662 F.2d 108, 113 (1st Cir. 1981) ("The interest asserted is that of covering effectively an ongoing judicial proceeding of significant hard news interest. Time is of the essence to such coverage in almost singular fashion."); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009).

A. Barring Press Applications for the Limited Purpose of Vindicating the Public's Presumptive First Amendment Right of Access to Criminal Proceedings and Court Records is Unconstitutional.

1. On Behalf of the Public, *The Observer-Dispatch* Has Standing for the Purpose of Opposing, and Appealing From, the Sealing of *Voir Dire* Questionnaires.

The denial of access to the juror questionnaires used in the underlying prosecution infringed *The Observer-Dispatch*'s First Amendment rights to receive information and gather news for dissemination to the public. In similar contexts, news organizations have repeatedly been granted permission to oppose the closure of criminal proceedings and the sealing of court records, and to appeal from denials of public access. As the United States Court of Appeals for the Second Circuit reasoned in a leading press access case, "[s]ince by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure." *United States v. Klepfer* (*In re Application of Herald Co.*), 734 F.2d 93, 102 (2d Cir. 1984).

Without exception, this Court has permitted press intervention to challenge entry of an order restricting public access in criminal proceedings. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 543 (trial court granted media petitioner's motion to intervene to contest gag order); *Richmond Newspapers v. Virginia*, 448 U.S. at 560 (newspaper permitted to intervene to vacate trial courtroom closure order); *Press-Enterprise*

I, 464 U.S. at 503-04 (superior court heard newspaper's petition to open *voir dire* examination to the press and public); *Press-Enterprise II*, 478 U.S. at 5 (press permitted to join in state's motion to release sealed transcript). In *Globe Newspaper Co. v. Superior Court*, this Court invalidated on First Amendment grounds a Massachusetts statute mandating courtroom closure during the testimony of minor victims of specified sexual offenses, notwithstanding that the trial court had "refused to permit [the] Globe to file its motion to intervene[.]" 457 U.S. at 599 n.3.

Following from this Court's decisions, the overwhelming majority of federal appellate courts have permitted limited intervention by the press in criminal (and civil) cases for the purpose of asserting the public's First Amendment right of access and, further, have conferred standing on news agencies to appeal from orders enjoining such rights:

- Second Circuit: *In re Application of Herald Co.*, 734 F.2d at 96 (allowing appeal after district court "in effect permitted The Herald Company to intervene in the pending criminal case"); *In re New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987) ("the district court chose to treat appellants as intervenors in the criminal proceeding"); *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) (referring to newspaper seeking access to judicial document as "non-party applicant"); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988) (holding the press was entitled to challenge trial court's issuance of a "gag order" because it was a potential recipient of the restricted information), *cert. denied*, 488 U.S. 946 (1988).

- Third Circuit: *United States v. Wecht*, 537 F.3d 222, 224 (3d Cir. 2008) (press intervention motion to challenge jury selection procedures for failure to identify potential jurors by name); *United States v. Antar*, 38 F.3d 1348, 1352 (3d Cir. 1994) (press intervention motion for public access to transcript of *voir dire* proceedings); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982) (newspaper appellant, and intervenor below, had standing to appeal from judgment denying its motion for access to transcripts of pretrial hearings held *in camera*).
- Fourth Circuit: *Cent. S. Carolina Chapter, Soc. of Prof. Journalists v. Martin*, 556 F.2d 706, 707-08 (4th Cir. 1977) (explaining that news reporters had standing to challenge gag order in pending criminal trial), *cert. denied*, 434 U.S. 1022 (1978).
- Fifth Circuit: *United States v. Gurney*, 558 F.2d 1206 (5th Cir. 1977) (holding that newspapers and reporter had standing to challenge orders denying access to criminal trial exhibits and transcripts), *cert. denied*, 435 U.S. 968 (1978).
- Sixth Circuit: *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (standing requirements satisfied where trial court order in civil case "gagging" counsel, parties, and others denied media access to potential sources of information and thereby impaired First Amendment rights).
- Seventh Circuit: *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) ("In order to ensure the right of access – of 'immediate and contemporary' access – our case law has recognized that those who seek access to such

material have a right to be heard in a manner that gives full protection of the asserted right.").

- Tenth Circuit: *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986) (media has standing to challenge order restraining jurors from talking to the press or public).

In capsulizing the state of the law, a federal district court recently observed that "federal courts generally have permitted limited intervention by the media for the purpose of pursuing a request for access to material made part of the record during court proceedings." *United States v. Bundy*, 2017 U.S. Dist. LEXIS 205642, at *4 (D. Nev. Dec. 14, 2017) (granting newspaper's emergency motion to intervene) (internal references omitted).

Indeed, the New York Court of Appeals' own leading public access decisions all arise from criminal cases in which the press was allowed to appear in the trial or criminal proceeding in a limited capacity on behalf of the public in opposing denials of public access. *See*, *e.g.*, *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 375 (1977) (press motion to intervene to raise *post hoc* challenge to closure of suppression hearing; "[w]hile finding this intervention untimely, the [trial] court accommodated the asserted public interest"), *aff'd*, 443 U.S. 368 (1979); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 436 (1979) (appeal of closure order entered in criminal proceeding where newspaper was entitled to be heard on application for public access).

Accordingly, press applications for public access purposes are standard practice in New York's criminal courts.[3] *See*, *e.g.*, *Capital Newspapers Div. of Hearst*

[3] New York State courts have also routinely approved press motions to intervene for public access to civil proceedings. *Maxim*

Corp. v. Lee, 139 A.D.2d 31, 35 (3d Dep't 1988) ("the procedural requirements for overriding the qualified constitutional right of access must be met before the court may order closure of a preliminary hearing") (citation omitted); *People v. Burton*, 189 A.D.2d 532, 534 (3d Dep't 1993) (press application in trial court to challenge sealing of DNA records identifying defendant charged with murder); *People v. Glogowski*, 135 Misc.2d 950, 951, 517 N.Y.S.2d 403, 404 (Sup. Ct. N.Y. Cnty., 1987) ("The media intervened in this case in accordance with the case law which mandates that any application for 'closure' be accompanied by notice to the media and an opportunity to be heard."); *People v. Macedonio*, 2016 N.Y. Misc. LEXIS 1682, at *10 (Sup. Ct. Suffolk Cnty, May 4, 2016) ("This Court finds that if standing were denied, it would effectively eviscerate both the First Amendment and common-law rights of access that protect the principle favoring open public records."); *People v. Arroyo*, 177 Misc.2d 106, 107 (Schoharie Cnty. Ct. 1998) (press applications in trial court opposing closure of pretrial suppression hearing).

In summarily precluding an appeal from a ruling that categorically denied *The Observer-Dispatch* a right to intervene in the trial court in the first instance, the Court of Appeals has excluded the press from challenging the imposition of secrecy over criminal proceedings. The improvident result is to avoid any consideration of the constitutional merits while

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Inc. v. Feifer, 145 A.D.3d 516, 517 (1st Dep't 2016) ("To allow them to assert their interests here, the proposed intervenors should be allowed to intervene in both actions for the limited purpose of obtaining access to court records."); *Doe v. New York Univ.*, 6 Misc.3d 866, 871-74 (Sup. Ct., N.Y. Cnty. 2004) (press intervention warranted to challenge order granting anonymity to alleged sexual assault victims).

licensing trial courts to disallow press advocacy of open criminal proceedings – precisely what this Court has warned against in emphasizing the imperative of strict compliance with the procedural requisites safeguarding the right of public access. *Richmond Newspapers*, 448 U.S. 580-81; *Globe Newspaper Co.*, 457 U.S. 607-609; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14. The Third Circuit has emphasized the threat to public access posed by disregard of the controlling procedures:

> In the First Amendment context, the procedural requisites to closure are crucial in order to protect against erroneous restrictions upon the right of access. Thus, the requirement that particularized findings of a compelling interest must be placed on the record before . . . a record [is] sealed is not only for the benefit of the reviewing court on appeal. It exists, most fundamentally, to assure careful analysis by the district court before any limitation is imposed, because reversal on review cannot fully vindicate First Amendment rights.

United States v. Antar, 38 F.3d at 1362; *see also id.* at 1359 ("Th[e] right of access may not be abridged absent the satisfaction of substantive and procedural protections.").

2. *The Observer-Dispatch* Is Entitled to be Heard in Opposition to Potential Infringement of the Public's First Amendment Access Rights.

Additionally, this Court has established that First Amendment rights may not be infringed absent the due process protections of notice and a hearing. For

example, the decision in *Globe Newspaper Co. v. Superior Court* arose from a state trial court order prohibiting the public from attending a trial during the testimony of a rape victim who was a minor. 457 U.S. at 598-99. The press had filed with the trial court a motion to intervene " 'for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions' " along with a motion to vacate the closure order. *Id.* at 599. The trial court denied both motions, and the Supreme Judicial Court of Massachusetts upheld the exclusion of the press and public during portions of the trial. *Id.* at 599, 600. This Court not only reversed the state courts on substantive grounds, it also noted that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.' " *Id.* at 609 n.25, quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring). *See also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968) ("Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights substantially imperils the protection which the Amendment seeks to assure.").

In order to protect against erroneous restrictions on the First Amendment right of access, federal appellate courts have uniformly required adherence to the procedural safeguards of granting the press and public notice and an opportunity to be heard before the closure of a criminal proceeding or the sealing of judicial documents:[4]

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[4] Notably, the Department of Justice has issued "guidelines [that] generally prohibit a government attorney from consenting to[, inter alia,] a closed plea or sentencing proceeding when the public has not been given notice of the proposed closure." *United*

- First Circuit: *United States v. Kravetz*, 706 F.3d 47, 59 (1st Cir. 2013) ("It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right. Providing the public with notice ensures that the concerns of those affected by a closure decision are fully considered.").
- Second Circuit: *United States v. Alcantara*, 396 F.3d at 200 ("[A] motion for courtroom closure should be docketed in the public docket files . . . . Entries on the docket should be made promptly, normally on the day the pertinent event occurs . . . . We think this type of general public notice suffices to afford an adequate opportunity for challenge to courtroom closure." (*quoting In re Application of Herald Co.*, 734 F.2d 93, 102-03 (2d Cir. 1984)).
- Third Circuit: *United States v. Criden*, 675 F.2d 550, 559-60 (3d Cir. 1982) (holding that in order to provide proper notice, "[t]he district courts should take whatever steps are necessary to ensure that the docket entries are made a reasonable time before the closure motion is acted upon" and explaining that doing so would allow "the public and press . . . to take timely action if they wished").
- Fourth Circuit: *United States v. Soussoudis (In re Washington Post Co.)*, 807 F.2d 383, 390 (4th Cir. 1986) (holding that before making specific findings in conjunction with an order to close a proceeding or seal documents, the district court must docket closure motions " 'reasonably in

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States v. Alcantara, 396 F.3d 189, 200 n.9 (2d Cir. 2005) (*citing* 28 C.F.R. § 50.9).

advance of their disposition' " in order to give the press and public notice and then "provide interested persons 'an opportunity to object to the request before the court ma[kes] its decision' " (*quoting In re Knight Pub. Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984)).

- Fifth Circuit: *Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 182 (5th Cir. 2011) ("Given the weight of the right of access, we agree that courts must provide the press and public with notice and an opportunity to be heard before closing a sentencing proceeding[.]").
- Ninth Circuit: *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible."); *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990) (affirming previous holding that "those excluded from the proceeding must be afforded a reasonable opportunity to state their objections" (*citing United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982)); *United States v. Brooklier*, 685 F.2d at 1168 (held, "when court has been made aware of the desire of specific members of the public to be present, reasonable steps to afford them an opportunity to submit their views should be taken before closure").
- Eleventh Circuit: *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (explaining that

giving "notice and an opportunity to be heard on a proposed closure" is required prior to closing a "historically open process where public access plays a significant role").

- D.C. Circuit: *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (explaining that before a plea agreement is sealed, "(1) [t]he government must file a written motion to seal the plea agreement and notice of that motion must be entered in the public docket; [and] (2) [t]he trial court must promptly allow interested persons an opportunity to be heard before ruling on the motion and entering the sealing order").

The rule is no different in New York. To safeguard the exercise of the affirmative and enforceable public access right, and for more than four decades, New York courts have time and again authorized the press and public to be heard in state trial courts for the purpose of challenging denials of access to judicial proceedings and records. As the Court of Appeals itself has established, the peremptory exclusion of the press from a criminal proceeding in disregard of this procedural right is constitutional error. *Capital Newspapers Div. of Hearst Corp. v. Clyne*, 56 N.Y.2d 870, 873 (1982) (reversing trial court order closing mid-trial criminal hearing without providing newspaper an opportunity to be heard; "it was error for the trial court not to have conducted a preliminary inquiry before deciding to exclude petitioner's reporter from the hearing"), *app. dismissed*, 63 N.Y.2d 673 (1984); *Gannett Co. v. De Pasquale*, 43 N.Y.2d at 381 ("the courts should of course afford interested members of the news media an opportunity to be heard . . ."); *Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383 (1983)

("no hearing should be closed before affected members of the news media are given an opportunity to be heard."); *New York Times Co. v. Demakos*, 137 A.D.2d 247, 252 (2d Dep't 1988) ("Prior to deciding whether closure of court proceedings is warranted, the Trial Judge must provide the interested parties with notice and an adequate opportunity to be heard on the issue."); *Coopersmith v. Gold*, 156 Misc.2d 594, 599 (Sup. Ct. Rockland Cnty., 1992) ("Prior to issuance of such orders the court is obligated, where possible, to afford the news media an opportunity to be heard."). As applied by New York courts, these protections specifically mandate that a trial judge hear counsel's argument in opposition to closure. *Capital Newspapers Div. of Hearst Corp. v. Lee*, 139 A.D.2d at 36 (noting right to oppose courtroom closure includes "the right to be heard by counsel"); *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d 708, 709 (4th Dep't) (reversing criminal court order excluding press and public from criminal preliminary hearing where trial court refused to delay proceedings "one and one-half to two hours" to permit newspaper's attorneys to be heard on closure order, holding "the press was not afforded an adequate opportunity to be heard") (*citing Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437 (1979) (noting that the "[trial] court entertained extended argument, both at the time of the original protest [to closure of mental competency hearing in criminal case] and when counsel appeared")), *app. dismissed*, 63 N.Y.2d 673 (1984).

The due process protections enshrined in the public access jurisprudence are crucial in avoiding unconstitutional restrictions on the right of access. As detailed above, these requirements obligate trial courts to grant news organizations an opportunity to be heard before the entry of any order restricting access in a

criminal proceeding. And yet, the effect of the Court of Appeals' final order is to deny the press standing for that very purpose, confronting New York State's trial judges with an insoluble dilemma: it is impossible for them to comply with their constitutional procedural obligations if the press has no standing to intervene in their courtrooms. This result defies law, logic, and practice extending over more than four decades. It warrants review and reversal by this Court.

II. THE ABSENCE OF A STATE LAW PROCEDURAL MECHANISM CANNOT PRECLUDE PETITIONERS' ASSERTION OF THEIR FIRST AMENDMENT PUBLIC ACCESS RIGHTS

This Court should also grant *certiorari* to address the constitutional deficiencies plaguing the New York Court of Appeals' reliance on the absence of a state procedural rule as precluding judicial review of Petitioners' application for public access predicated on the unequivocal requirements of the First Amendment to the United States Constitution as applied in this Court's longstanding precedent. The Court of Appeals' unexplained statement that *The Observer-Dispatch* "does not have standing to file a CPL 460.20 application" (App. 1a) not only exalts form over substance in the extreme but forecloses the ability of the press, a neutral party untinged by the partisan interests of the government and the defendant, to present arguments in opposition to closure and/or sealing in criminal proceedings. *See, e.g., Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 583 (S.D.N.Y. 1996) ("Important interests are best championed by those most directly affected by their impairment."). According to established case law, no such legislative authorization is required for judicial review where constitutional

interests such as the public's First Amendment right of access to court proceedings and records are directly at stake.[5]

The decision in *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008), illuminates this very point. In *Aref*, the Second Circuit pointedly noted that "[t]he Federal Rules of Criminal Procedure make no reference to a motion to intervene in a criminal case." *Id.* at 81. However, this did not prevent the *Aref* court from affirming the validity of intervention motions as "common in this Circuit to assert the public's First Amendment right of access to criminal proceedings." *Id.* It makes no sense to abandon the decades of precedent establishing the procedures necessary to protect the public's constitutional right of access merely because New York's Criminal Procedure Law does not contemplate press intervention or an appeal from a denial of access. This would render the right of access chimerical in criminal courtrooms throughout New York, a result incompatible with the rule embraced by the State's federal courts and anathema to the First

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[5] In civil matters, even complex commercial cases, New York appellate courts have refused to permit wooden application of state procedural rules to interfere with press applications brought to vindicate the public's First Amendment right of public access. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 501 (2d Dep't 2007) ("Nor was Bloomberg News required to meet the formal requirements for intervention under CPLR 1012 or 1013, since, prior to issuance of an order to seal judicial documents, the court is obligated, where possible, to afford news media an opportunity to be heard."). *See also Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) ("Thus, where, as here, the movant describes the basis for intervention with sufficient specificity to allow the district court to rule, its failure to submit a pleading is not grounds for reversal.").

Amendment. Contrary to the effect of the order issued by the New York Court of Appeals, that rule could hardly be clearer: "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper." *Id.*

Where, as here, a public access right of constitutional dimension is implicated, the lack of a procedural rule, absent more, is an insufficient basis for the abridgment of that right. The reason is straightforward: through its own administrative action, the government cannot unilaterally abrogate the public's right of access to judicial documents. *In re New York Times Co.*, 828 F.2d at 115 ("[o]bviously, a statute cannot override a constitutional right"). In *New York Times*, the Second Circuit rejected the federal government's contention that the confidentiality requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, *et seq*., had "expressly and deliberately limited" the public's First Amendment right of access to criminal proceedings where Title III materials might be disclosed, holding that "where a qualified First Amendment right of access exists, it is not enough to simply cite [a contrary rule]." *Id.* at 114-15; *see also United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989) ("the argument that the statute always forbids public disclosure of unsuppressed, intercepted communications in briefs and memoranda cannot withstand scrutiny"); *In re Search Warrants Issued on June 11, 1988, etc.*, 710 F. Supp. 701, 704 (D. Minn. 1989) ("statutes, by themselves, cannot overcome the constitutional right of access asserted by the publishers").

Indeed, a state "jurisdictional rule cannot be used as a device to undermine federal law." *Haywood v. Drown*, 556 U.S. 729, 739 (2009) (on certiorari from the

Court of Appeals, striking New York law burdening prisoner's exercise of civil rights). Instead, "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.' " *Felder v. Casey*, 487 U.S. 131, 150 (1988) (*quoting Brown v. Western R. of Ala.*, 338 U.S. 294, 298-99 (1949)). "In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood*, 556 U.S. at 736. That is exactly the effect of the Court of Appeals' order from which Petitioners seek review.

This Court should reinforce that the First Amendment requires the disavowal of state legislative authorization as a necessary precondition for the exercise of public access rights. When, as the eyes and ears of the public, the press challenges a trial court's sealing of court records, a state's criminal procedure law cannot be construed to extinguish the right of access to the courts in the first instance, or to prevent an appeal from a denial of that right. Those rights are governed by the First Amendment, the requirements of which state procedural rules cannot nullify or abridge.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the Court to grant their petition for certiorari review of the order of the New York Court of Appeals to the effect that, absent express authorization in state procedural law, the press and public do not have standing to assert the presumptive First Amendment right of access, or to appeal from denials of that right, in criminal proceedings.

Respectfully submitted,

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May 14, 2019

APPENDIX

APPENDIX A

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
-against-
KAITLYN CONLEY,
Defendant.

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC. ET AL.
Intervenors-Appellants.

BEFORE: LESLIE E. STEIN, Associate Judge

ORDER DISMISSING LEAVE

Gatehouse Media et al. having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from two orders in the above-captioned case;[*]

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed upon the ground that Gatehouse Media et al. does not have standing to file a CPL 460.20 application.

Dated: February 13, 2019
at Albany, New York

/s/ Leslie Stein
Associate Judge

[*] Description of Order: Orders of the Appellate Division, Fourth Department, dated October 5, 2018, dismissing appeals from orders of the County Court, Oneida County, dated November 9, 2017 and December 19, 2017.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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944

KA 17-02073

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

KAITLYN CONLEY,

Defendant.

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC., AND JOLENE CLEAVER,

Intervenors-Appellants. (Appeal No. 1.)

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PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

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Greenberg Traurig, LLP, Albany
(Michael J. Grygiel of Counsel),

For Intervenors-Appellants.

Scott D. Mcnamara, District Attorney, Utica
(Steven G. Cox of Counsel),

For Respondent.

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MEMORANDUM AND ORDER

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered November 9, 2017. The order, insofar as appealed from, denied the motion of GateHouse Media New York Holdings, Inc., and Jolene Cleaver for access to juror identifying information.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is vacated.

Memorandum: In April and May 2017, defendant Kaitlyn Conley was tried for murder in the second degree (Penal Law § 125.25 [1]) in County Court arising out of the fatal poisoning of Mary Yoder, Conley's employer and the mother of her boyfriend. The trial resulted in a hung jury, and a second trial commenced in October 2017. On October 31, 2017, and before the jurors had begun deliberating, Jolene Cleaver, a reporter for a newspaper published by GateHouse Media New York Holdings, Inc. in the City of Utica (intervenors), left a telephone message with the court requesting the names and addresses of the jurors seated in the Conley trial. A formal written request for the information was not submitted, and the court denied the request.

Later on October 31, 2017, counsel for the intervenors submitted a letter motion to the court seeking, inter alia, the names and addresses of the empaneled jurors. Copies of the motion were sent to Conley's defense counsel and the Oneida County District Attorney. An oral argument on the motion was held on November 3, 2017, which was after the jury had begun deliberations. During oral argument, counsel for the intervenors amended his motion to include a request for the juror questionnaires that had been

used during voir dire. At the conclusion of oral argument, the court issued an oral decision denying the motion. On November 9, 2017, and after the jury had returned a verdict finding Conley guilty of manslaughter in the first degree (Penal Law § 125.20) and not guilty of murder in the second degree, the court's oral decision was reduced to an order.

Subsequently, the District Attorney requested further oral argument on the motion and the court granted that request. On December 19, 2017, and after the further oral argument, the court issued a written decision and order that set forth in detail the basis for the denial of the intervenors' motion. In appeal No. 1, the intervenors appeal from the order issued on November 9, 2017 and, in appeal No. 2, they appeal from the order issued on December 19, 2017.

Although it was not raised during proceedings on the intervenors' motion, it is well established that "[t]he Criminal Procedure Law provides no mechanism for a nonparty to intervene or be joined in a criminal case" (*People v Combest*, 4 NY3d 859, 860 [2005]). Moreover, even assuming, arguendo, that the mechanism for intervening in an action set forth in the Civil Practice Law and Rules authorizes such an intervention in a criminal case (*see* CPLR 1013), we note that there is a statutory requirement that "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought" (CPLR 1014), and thus the court here would have "had no power to grant . . . leave to intervene" without a proposed pleading from the intervenors (*Matter of Colonial Sand & Stone Co. v Flacke*, 75 AD2d 894, 895 [2d Dept 1980]; *see Matter of Zehnder v State of*

New York, 266 AD2d 224, 224-225 [2d Dept 1999]; *Rozewicz v Ciminelli*, 116 AD2d 990, 990 [4th Dept 1986]).

Consequently, in each appeal we must vacate the order and dismiss the appeal.

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

945

KA 18-00249

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

KAITLYN CONLEY,

Defendant.

GATEHOUSE MEDIA NEW YORK HOLDINGS, INC., AND JOLENE CLEAVER,

Intervenors-Appellants. (Appeal No. 2.)

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

Greenberg Traurig, LLP, Albany (Michael J. Grygiel of Counsel),

For Intervenors-Appellants.

Scott D. McNamara, District Attorney, Utica (Steven G. Cox of Counsel),

For Respondent.

MEMORANDUM AND ORDER

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered December 19, 2017. The order denied the motion of GateHouse Media New York Holdings, Inc., and Jolene Cleaver for access to juror identifying information.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is vacated.

Same memorandum as in *People v Conley* ([appeal No. 1] – AD3d – [Oct. 5, 2018] [4th Dept 2018]).

Entered: October 5, 2018

Mark W. Bennett
Clerk of the Court

APPENDIX D

STATE OF NEW YORK COUNTY COURT
ONEIDA COUNTY

Indictment No. 2016-185

THE PEOPLE OF THE STATE OF NEW YORK

against

KAITLYN CONLEY,

Defendant.

APPEARANCES:

Scott D. Mc Namara, Esq.
Oneida County District Attorney for the People

Michael J. Grygiel, Esq.,
Attorney for Gate House New York Holdings, Inc.
and Jolene Cleaver

DECISION AND ORDER

DWYER, J.:

The defendant was charged under Indictment 2016-185 with Murder in the Second Degree [Penal Law §125.25(1)]. A jury trial was conducted between the dates of April 24, 2017, and May 18, 2017, after which the jury could not reach a unanimous decision. The jury was discharged pursuant to Criminal Procedure Law §310.60 subdivisions (a) and (b).

A second jury trial commenced on October 12, 2017. The trial was continuing when, on October

31, 2017, Jolene Cleaver, a reporter for the Utica Observer-Dispatch newspaper, left a message on this Court's office telephone requesting the names and home addresses of the seated jurors on the *Conley* trial. The jury had not yet begun deliberations in the case. The reporter said that counsel for the newspaper wanted the information and that she did not know the reason for the request. The newspaper did not submit a formal written request for the information and this Court denied the request at that time.

Attorney Michael J. Grygiel contacted the Court on behalf of the newspaper and requested to be heard in support of the request. Oneida County District Attorney Scott McNamara asked to be heard in opposition to any release of the jurors' names and home addresses. Defense counsel for Ms. Conley took no position on the newspaper's request.

Oral argument was held in the afternoon of November 3, 2017. Because the Court was presiding over Ms. Conley's criminal trial wherein the jury was actually deliberating at the time, both counsel had limited time within which to make their arguments. In fact, the start of that proceeding was delayed while the jury listened to read-back of testimony in open court prior to resuming their deliberations.

Thereafter, the Court heard oral argument during which Attorney Grygiel amended the newspaper's original request and asked that his client be provided, in addition to the jurors' names and home addresses, copies of questionnaires that had been filled out by the jurors during the voir dire process. He also asked that the Court instruct the jurors that, at the conclusion of the trial, they were free to speak with members of the news media. The Court issued

an oral decision from the bench denying the newspaper's request for the names, home addresses and questionnaires of the seated jurors. Counsel for the newspaper intended to appeal the Court's decision and submitted a two-page written order summarily denying the newspaper's request so that it could be included in the record on appeal. That proposed order did not contain specific findings of fact or conclusions of law. The Court signed that order on November 8, 2017.

The trial jury reached a verdict on November 6, 2017, and found defendant guilty of Manslaughter in the First Degree. After delivering their verdict, the jurors were instructed, as they are in every case, that they were now free to talk about the case with the news media or, if they wished, they could decline to be interviewed. Therefore, the newspaper's request with respect to that issue has been rendered moot.

On November 15, 2017, District Attorney McNamara contacted the Court and Attorney Grygiel by e-mail asking for the opportunity to set forth, on the record, additional reasons for his opposition to the release of the jurors' names, home addresses and questionnaires. In support of this request, he argued that he wished to supplement the proposed record on appeal and provide additional information which he felt could not, and should not, I have been expressed in open court while the trial was underway and the jury was deliberating. Attorney Grygiel opposed the request on the basis that a decision had already been rendered and a prevailing party may not request re-argument. The Court approved the District Attorney's request over the objection of counsel for the newspaper and scheduled additional oral argument for December 1, 2017.

During this supplemental oral argument, Attorney Grygiel and District Attorney McNamara engaged in a spirited exchange and a review of the stenographic transcript establishes that both attorneys advocated strongly in support of their respective positions. The arguments were varied and touched on issues that were wide ranging and cannot be readily placed in neat, easily defined categories. However, it is fair to say that Attorney Grygiel relied primarily on general legal principles and First Amendment jurisprudence in support of his position that the newspaper had an essentially unqualified right to the names and home addresses of the jurors as well as to the questionnaires they had completed during the jury selection process. District Attorney McNamara focused on the facts of this particular case and the issues that typically arise in any criminal trial with respect to ensuring that an impartial jury reaches a just verdict based solely upon the evidence presented in court.

As a threshold matter, it should be made clear that voir dire in this matter was conducted in an open courtroom. Members of the public as well as representatives from several news media organizations were in attendance throughout the entire jury selection process. The names of potential jurors were selected at random by the court clerk and announced publicly in the courtroom. Those names, and the names of the persons actually selected to serve on the jury, appear as a matter of record in the transcript of the trial. This Court has no independent knowledge as to whether Ms. Cleaver was present during that portion of the trial. However, the Court determines that it has no affirmative obligation to provide a particular journalist or news organization with information which was readily available to anyone present during a trial held in open court. The request

that this Court provide the Utica Observer-Dispatch or its reporter with the names of the sworn jurors in the matter of *People v. Kaitlyn Conley* is denied.

The individual home address of a particular juror was not mentioned or otherwise brought to light during voir dire. Nor was that information asked for on the questionnaire that each of them filled out as part of the jury selection process. The questionnaire simply asked the prospective juror to identify the municipality or township where he or she resides within Oneida County. Therefore, the Court cannot provide the newspaper or its employee with the home addresses of the jurors from its own files.

It is important to note that there are two distinct questionnaires used during the process to select a jury in this Court. Blank copies of both questionnaires are attached to this Decision and Order. The first is a "juror's qualification questionnaire" as that term is used in Judiciary Law §509. That document is sent by the Office of the Commissioner of Jurors to a citizen of the County in order to obtain information which is then used to determine if such person is qualified to be summoned for jury duty. Obviously, the home address of any person sent such a questionnaire, or summoned for jury duty, is on that document. Those questionnaires and records are kept in the Office of the Commissioner of Jurors and not in this Court's files. The Legislature has deemed that the information contained in the juror's qualification questionnaires is confidential. Judiciary Law §509, in pertinent part, provides:

> (a) The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. . . . . Such question-

> naires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division. (Emphasis supplied).

The second questionnaire is a document used specifically by this Court during voir dire in criminal trials in order to obtain relevant personal information from each prospective juror in order to assist the Court and the attorneys in selecting a fair and impartial jury. As set forth earlier, that questionnaire does not ask a juror to disclose his or her specific home address. However, it does ask for a myriad of personal, private and potentially embarrassing information, some of which pertains not only to the juror, but to other family members, including his or her children. It is this second questionnaire that Attorney Grygiel contends should be made available to the Observer-Dispatch. This Court does not agree.

Our Court of Appeals addressed this issue in the context of a request for such information pursuant to the Freedom of Information Law (FOIL) in *Newsday, Inc. v. Sise*, 71 NY2d 146 [1987]), and reached the following conclusion:

> While Judiciary Law §509(a) refers only to the juror qualification questionnaires, its obvious purpose is to provide a cloak of confidentiality for the *information* which the questionnaires contain. It is the knowledge about the jurors — the private details obtained from the questionnaires concerning their spouses' names, the names and ages of their children, their home telephone numbers, occupations, educational backgrounds and criminal records, if any — which the statute is designed to protect from

> public disclosure .... It is the information from the questionnaires, not the forms themselves which, if made public, could invade the jurors' privacy interests or threaten their safety and that information, therefore was made confidential. .... We hold, then, that Judiciary Law §509(a) shields from disclosure not only the juror qualification questionnaires but also those portions of other records containing information obtained from the questionnaires. (*Id*., at 152 [internal citations omitted; emphasis supplied]).

The second questionnaire which was filled out by the prospective jurors as part of the voir dire process in this matter contained much of the same information those jurors had provided in response to the juror qualification questionnaire. Furthermore, the second questionnaire required each juror to provide additional, more detailed personal background information which supplemented that previously provided in the juror qualification questionnaire. Finally, the second questionnaire, and the personal information it contained, would not even have come into existence had the juror not completed the qualification questionnaire and been summoned for jury duty. Thus, the Court finds that the second questionnaires completed by the jurors in this matter during the voir dire process constitute *other records containing information obtained from the [juror qualification] questionnaires* as set forth in *Newsday. Inc. v. Sise* which must be kept confidential pursuant to Judiciary Law §509(a).

Counsel for the Observer-Dispatch argues that the holding in *Newsday, Inc. v. Sise* does not apply here inasmuch as the newspaper's right to the jurors' names, home addresses and completed question-

naires arises, not under FOIL, but pursuant to the First Amendment to the Constitution of the United States.

The First Amendment guarantees the public and the press a *qualified* right of access to criminal trials. That right of access must be balanced with "the right to privacy of prospective jurors" (*Matter of Daily News, L.P. v. Wiley*, 126 AD3d 511, 512 [1st Dept. 2015] [emphasis supplied]; see *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 580 [1980]; see also *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty*., 464 US 501, 510 [1984]). "The press is not imbued with any special right of access, and while it possesses 'the same right of access as the public,' it has no right to information about a trial that is greater or superior to that of the general public" (*Matter of Daily News L.P*., at 512, quoting *Courtroom Tel. Network LLC v. State of New York*, 5 NY3d 222, 229 [2005]). "Decisions to seal or disclose records fall within the inherent power of the court to control the records of its own proceedings" (*Matter of Daily News L.P*., at 512; see *Matter of Crain Communications v. Hughes*, 74 NY2d 626, 628 [1989]). A court must ensure that a defendant and the People receive a fair trial and it must do so in a manner that balances the interests of "the defendant, jurors, witnesses, attorneys and the public at large" (*Matter of Daily News L.P*., at 512, quoting *Courtroom Tel. Network LLC* at 232).

In an effort to balance the newspaper's "qualified right of access" with a juror's right to privacy in accordance with *Matter of Daily News L.P. v. Wiley,* the Court listened to the arguments of both attorneys. The District Attorney outlined a number of things done by family members and friends of the

defendant on her behalf in an attempt to influence the jury during the first trial. He also expressed legitimate concerns over the actions of a particular juror during the first trial as well as the manner in which information about this case was reported by a reporter from a local radio show.[*] The Court was also aware of many of those same actions and events at the time and did its best to ensure that the jurors in both trials were not unfairly influenced by them.

Counsel for the newspaper would not, or could not, state a satisfactory reason in support of his client's request for the disclosure of the presumptively confidential information the jurors had provided in the questionnaires they had completed during voir dire. Indeed, when the Court inquired as to *why* the Observer-Dispatch wanted the detailed, personal information contained in the questionnaires, counsel responded that his client had no burden to justify the request and argued that the Court must justify its refusal to authorize the release of such information.

There can be little doubt that, in addition to balancing the "qualified right of access" of the press with a juror's right to privacy, the Court also has a duty to ensure that a trial is conducted in a manner that does not undermine confidence in the criminal

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[*] The District Attorney's position with respect to his opposition to the release of the juror's home addresses and their completed voir dire questionnaires is set forth in detail at pages twenty-three through thirty-six of the stenographic transcript of the proceeding held on December 1, 2017. Despite the fact that such proceeding took place after issuance of the initial order in this matter, the Court believes that the substance of the entire argument held at that time should be made a part of the record on any appeal from the order entered on November 8, 2017, as well as this Decision and Order.

justice system. Clearly, the "public at large," as that term is used in *Matter of Daily News L.P. v. Wiley,* has an interest in seeing to it that criminal trials are conducted in a secure and orderly manner. In this Court's view, the disclosure of the confidential information contained on the voir dire questionnaires in this case would diminish the public's confidence in the criminal justice system. The citizens summoned for jury service in this matter were asked to perform an important civic duty which was undoubtedly inconvenient and required a certain amount of personal sacrifice on their part. Nevertheless, the vast majority of them responded to their summons voluntarily and appeared for the voir dire portion of the trial when scheduled to do so. They co-operated throughout the voir dire process and provided certain personal information on questionnaires they had been asked to complete. It is not unreasonable for them to expect that their actual residential address and other, far more personal information, would not be disclosed without their knowledge and consent. Nor will it be unreasonable for jurors who are summoned to serve in the future to expect that same level of confidentiality. Therefore, the Court finds that the disclosure of the information sought by the Observer-Dispatch would have a chilling effect on the willingness to serve of those members of the public summoned for jury duty in the future.

The Criminal Procedure Law permits a court to regulate the disclosure of the information sought by the Observer-Dispatch. Specifically, CPL §270.15 provides:

> (1-a) The Court may, for good cause shown, upon motion of either party or any affected person or upon its own initiative, issue a protec-

> tive order for a stated period regulating disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.

Here, the newspaper initially sought the release of the jurors' residential addresses and the juror questionnaires while the trial was underway and *the jury was deliberating.* Jury deliberations in this trial lasted more than one day and included a time-span over a weekend during which the jurors were not sequestered and were, presumably, in their homes. Similarly, jury deliberations during the first trial lasted several days and the jury was not sequestered. Both trials were the subject of extensive local and national news coverage which had generated strong feelings among members of the public as to the defendant's guilt or innocence. During the arguments conducted on November 3, 2017, and December 1, 2017, the District Attorney expressed many of his concerns with regard to known attempts by family members, neighbors, and friends of the defendant to improperly influence the jury, both in and out of court. Those concerns are now a part of the record and were known to this Court at the time.

The Court determines that there existed a high likelihood that jury tampering, or the harassment of a juror or jurors, would occur if the residential addresses of the jurors, or other information contained on their questionnaires, was disclosed to the Observer-Dispatch, any other news media organization, or any member of the public *while the jury in*

this matter was still deliberating. The Court hereby re-affirms its denial of the request for such disclosure in its prior Order dated November 8, 2017.

Furthermore, after balancing the newspapers *qualified* right of access to the information contained in the voir dire questionnaires with the fundamental right to privacy to which a juror is entitled, the Court determines that the information contained in those questionnaires, with the exception of the residential addresses, shall not be disclosed by the Oneida County Commissioner of Jurors at any time. The request by the Utica Observer-Dispatch for disclosure of the voir dire questionnaires completed by the prospective jurors summoned for jury duty in the matter of *People v. Kaitlyn Conley* is denied.

Finally, in accordance with CPL §270.15(1-a), and based upon the Court's finding that there is a likelihood that the jurors will be subjected to harassment if their residential addresses are disclosed to the Utica Observer-Dispatch, the Court hereby issues a protective order for a period of one (1) year prohibiting the Oneida County Commissioner of Jurors from disclosing the residential addresses of those persons summoned for jury duty in the matter of *People v. Kaitlyn Conley*.

The foregoing constitutes the opinion, decision and order of the Court.

ENTER.

/s/ Michael L. Dwyer
Michael L. Dwyer
Oneida County Court Judge

Dated: December 13, 2017

[SEAL] JUROR QUALIFICATION QUESTIONNAIRE

ONEIDA COUNTY

The law requires you to complete this questionnaire. All answers are confidential. Please respond within 10 days. Your name was selected at random from voter, Department of Motor Vehicles, tax, social services or unemployment lists. This is not a summons. You are NOT required to appear for service at this time. The questionnaire must be completed:

James P. Goodman
State of New York / Unified Court System
Oneida County Commissioner of Jurors
200 Elizabeth Street
Utica, New York 13501

ON THE WEB: www.nyjuror.gov/qualify

OR BY PHONE: TOLL FREE 1-866-648-4880

OR BY MAIL: RETURN COMPLETED QUESTIONNAIRE IN ENCLOSED ENVELOPE

The New York State Court System does not ask for information such as credit card or bank account numbers or personal information such as names and ages of family members. Do not give this kind of information to anyone claiming to represent the courts. If you receive this type of request, contact your county Commissioner of Jurors.

If you have questions, please call (315) 266-4411 OR visit www.nyjuror.gov

Complete below ONLY if your name or address has changed or if you use a different mailing address.

Name_____

Address_____ Apt.#_____

City/Town_____ Zip_____

Home Tel. _____ Cell Tel._____

Business Tel. _____

1. What is your date of birth? _____/_____/____

Month Day Year

2. Can you understand and communicate in English?

YES ❑ NO ❑

3. Are you a citizen of the United States?

IF NO, mail a copy of a current Visa, Passport, Green Card or Employment Authorization Card with the completed questionnaire.

YES ❑ NO ❑

4. Are you a resident of ONEIDA COUNTY?

IF NO, mail copies of TWO forms of proof with the completed questionnaire: Acceptable proof includes tax return (with amounts deleted), voter registration card, deed, lease, mortgage, drivers license, DMV-ID, utility bill. Only one can be a utility bill. Commissioner has discretion to require tax return. You will be advised if this is required.

YES ❑ NO ❑

5. Are you at least 18 years old?

IF NO, mail copy of birth certificate with the completed questionnaire.

YES ❑ NO ❑

6. Have you been convicted of a felony?

IF YES, indicate crime, sentence, court and date of conviction in the space provided on back of this form and return a copy of the certificate of disposition. If

you have a Certificate of Good Conduct or Relief from Civil Disabilities, you are eligible to serve.

YES ❑ NO ❑

7. Have you been a juror in New York State or Federal Court in the last 6 years or in Town or Village Court in the last 2 years?

IF YES, mail copy of certificate of service with completed questionnaire.

YES ❑ NO ❑

False statements are punishable as a crime under Penal Law Section 210.45.

SIGNATURE _____

DATE: _____/_____/_____
Month Day Year

JUROR QUESTIONNAIRE

UCS 140-4-13-05

Please answer all questions. Your answers will be used to assist in selecting a jury. If there is anything you prefer to discuss in private, please ask to speak with the judge out of the hearing of other jurors by answering yes to Question 18. THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY

1. Name _____

2. Juror # _____

3. Age _____

4. ❑ Male ❑ Female

5. Town/village or geographical area (neighborhood) where you live?

_____

6. Number of years

   a. living at current address? _____

   b. living in this county? _____

7. Where were you born? _____

8. Are you currently:

   ❑ Single ❑ Married ❑ Other

9. What is the highest level of education you completed?

   ❑ Less than high school

   ❑ High school graduate

   ❑ More than high school

      a. number of years _____

_____

b. course of study _____

_____

_____

10. Are you currently employed? ❑ No

❑ Yes – If yes:

a. who is your employer? _____

b. what is your occupation? _____

11. Occupations and relationship to you of other adults in your household:_____

12. Gender and age of your children:_____

13. Did you ever sit on a jury before? ❑ No

❑ Yes — If yes:

a. When? _____

b. Where? _____

c. Type of jury: box

❑ Grand jury ❑ Trial Jury ❑ Both

d. Type of case(s):

❑ Criminal ❑ Civil ❑ Both

e. Did the jury reach a verdict?

❑ Yes ❑ No ❑ Both

14. Have you or someone close to you ever:
(check all that apply)

❑ Been the victim of a crime

❑ Been accused of a crime

❑ Been convicted of a crime

❑ Been a witness to a crime

- ❑ Testified in court
- ❑ Sued someone else
- ❑ Been sued by someone else.

15. Have you or someone close to you (relative or close friend) ever been employed by: *(check all that apply)*

- ❑ Law Office
- ❑ Medical profession
- ❑ Law enforcement or criminal justice agency
- ❑ Insurance industry
- ❑ Local municipality (city/county worker)

16. Are you actively involved in any civic, social, union, professional or other organizations? ❑ No

❑ Yes: _____

_____

17. What are your hobbies or recreational activities?

_____

_____

_____

18. Is there anything relevant to your jury service that you prefer to discuss in private?

❑ Yes ❑ No

I affirm that the statements made on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law.

_____

Signature of Prospective Juror Date / /

APPENDIX E

STATE OF NEW YORK COUNTY COURT
COUNTY OF ONEIDA

———

PEOPLE OF THE STATE OF NEW YORK,

-v.-

KAITLYN CONLEY,

Defendant.

———

At a Term of the County Court of the State of New York, County of Oneida, held at the Oneida County Courthouse, 200 Elizabeth Street, Utica, New York on the 3rd day of November 2017

———

PRESENT: Hon. Michael L. Dwyer, J.

———

ORDER

WHEREAS, the above-captioned criminal prosecution came on for a jury trial on or about October 9, 2017; and,

WHEREAS, on October 31, 2017, GateHouse Media New York Holdings, Inc., publisher of *The Observer-Dispatch* (the *"OD"* or "Newspaper"), and reporter Jolene Cleaver (collectively, "Press Movants") filed a letter motion seeking to intervene for the limited purpose of obtaining public access to juror questionnaires in this proceeding, particularly, the names and addresses of the empaneled jurors; and,

WHEREAS, on November 2, 2017, Press Movants requested expedited hearing and determination of their October 31, 2017, letter motion; and,

WHEREAS, on November 3, 2017, at 2:30 p.m. the Court held oral argument, on the record, as to Press Movants' application for public access to juror questionnaires; and,

WHEREAS, the Oneida County District Attorney's Office orally opposed Press Movants' request for disclosure, while defense counsel took no position thereupon; and,

WHEREAS, at the conclusion of the November 3, 2017, oral argument the Court issued an oral decision from the Bench denying Press Movants' application for public access to juror questionnaires:

NOW, based on the foregoing papers and for the reasons stated on the record in open court on November 3, 2017, it is hereby,

ORDERED:

1. Press Movants' October 31, 2017, application for public access to juror identifying information in the form of juror questionnaires is hereby DENIED.

ENTER.

/s/ Michael L. Dwyer
HON. MICHAEL L. DWYER, J.
11-8-2017

Papers Considered:

Letter-Motion Dated October 31, 2017
Reply Correspondence Dated November 2, 2017