THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **State v. Robert S. Andersen**
Case Number: **218-2018-CR-00241**

Enclosed please find a copy of the court's order of August 31, 2018 relative to:

Court Order

September 04, 2018

Maureen F. O'Neil
Clerk of Court

(834)

C: William D. Pate, ESQ; Michael A. Delaney, ESQ; Henry R. Klementowicz, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

STATE OF NEW HAMPSHIRE

v.

ROBERT S. ANDERSEN

218-2018-CR-241

ORDER

The matter before the court is the defendant's motion to amend the dispositional conference order (Docket Document 26). The court held a hearing on this motion on August 22, 2018. The defendant's motion is now GRANTED as follows:

> **The dispositional order of May 23, 2018 is VACATED to the extent that it restricts the parties and their attorneys from disclosing information learned from the police reports.**

The court's May 23 order was intended to be an interim, stop-gap order that preserved the status quo. Upon careful consideration, the court finds that this sweeping protective order violates the First Amendment to the United States Constitution and Part 1, Article 22 of the New Hampshire Constitution.

Make no mistake, an order that forbids the parties and counsel in a criminal case from speaking about the facts of the case is a prior restraint on speech. Therefore, such an order implicates the core protections of the First Amendment and Part 1, Article 22. See e.g., Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1304 (1983) ("[E]ven a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and

causes irreparable injury to First Amendment interests as long as it remains in effect."); In re N.B., 169 N.H. 265, 270 (2016).

That said, the court has both the jurisdiction and the obligation to impose carefully tailored constraints on the litigants and their attorneys with respect to extrajudicial statements that (a) reveal privileged information that was disclosed through court mandated discovery (such as, for example, medical records, trade secrets or the identity of confidential government informants), or (b) creates a substantial likelihood of material prejudice to the parties' rights to a fair and impartial trial. See e.g., Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (discussing the "substantial likelihood of material prejudice" standard); United States v. Scarfo, 263 F.3d 80, 94, (3d Cir. 2001) (same); United States v. Brown, 218 F.3d 415, 424 (5th Cir. 2000) (same).

Neither of these circumstances is present in this case. Neither party has suggested that the discovery contains privileged or confidential information. Likewise, there has been no claim of a likelihood of material prejudice to the adjudicative process. There is not yet a jury and there is no serious concern that the jury pool will be poisoned by extrajudicial statements. This case is primarily of interest to residents of Salem but the jury pool will be drawn from the entire county, including cities and towns that are outside Salem's orbit (such as Portsmouth, Derry, Raymond, Epping, etc.). To the extent that the case has, and may in the future, garner statewide publicity, it is unlikely to be so pervasive as interfere with jury selection. Exposure to media coverage can be adequately addressed through routine juror voir dire.

The State's concern appears be, that, if the case is "tried in the media," the resulting news coverage could be unfair due the lack of a complete factual record. No doubt, a criminal

jury trial, conducted under the aegis of an impartial judiciary, subject to the dispassionate application of the rules of evidence, with both sides represented by competent counsel, is likely to lead to a better understanding of the admissible facts than a two-minute interview on the nightly news. Yet, the only material prejudice that the court can consider is material prejudice to the fairness of the adjudication.

In the mine run of cases—including very serious cases that attract substantial media interest, such as first degree murder prosecutions—the State does not seek, and the court does not impose gag orders. Counsel in all cases, remain subject to N. H. R. Prof. R. 3.6, which imposes reasonable and constitutional restraints on extrajudicial statements, as well as a number of safe harbors for certain types of extrajudicial statements to the media. The Rule's restraints kick in only when extrajudicial statements "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6(a). The court has no reason to believe that counsel will discard their obligations under the rule.

The court also notes that the calculus will change once a jury is selected. The court does not anticipate that any party will make any substantive statement to the media between the time the jury is first empaneled and the time it is finally discharged.

August 31, 2018

Andrew R. Schulman,
Presiding Justice