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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Case No. CR01-24-31665

**MEMORANDUM IN SUPPORT OF
MOTION TO BE HEARD AS
INTERESTED PARTIES**

AMERICAN BROADCASTING
COMPANIES, INC. d/b/a ABC NEWS; THE
ASSOCIATED PRESS; RADIO
TELEVISION DIGITAL NEWS
ASSOCIATION; TEGNA INC./KREM
(SPOKANE), KTVB (BOISE) AND KING
(SEATTLE); KXLY-TV/4 NEWS NOW AND
KAPP/KVEW-TV—MORGAN MURPHY
MEDIA; SCRIPPS MEDIA, INC., d/b/a KIVI-
TV, A DELAWARE CORPORATION; THE
SPOKESMAN-REVIEW/COWLES
COMPANY; LAWNEWZ, INC.; WP
COMPANY LLC, DBA THE WASHINGTON
POST; SOCIETY OF PROFESSIONAL
JOURNALISTS; THE SEATTLE TIMES;
RADIO TELEVISION DIGITAL NEWS

ASSOCIATION; and THE NEW YORK
TIMES COMPANY,

Interested Parties.

INTRODUCTION

American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Radio Television Digital News Association, TEGNA Inc./KREM (Spokane), KTVB (Boise) and KING (Seattle); KXLY-TV/4 NEWS NOW and KAPP/KVEW-TV – Morgan Murphy Media; Scripps Media, Inc., d/b/a KIVI-TV, The Spokesman-Review/Cowles Company, LawNewz, Inc., WP Company d/b/a The Washington Post, the Society of Professional Journalists, The Seattle Times, Radio Television Digital News Association, and The New York Times (“Interested Parties”) seek leave from this Court to submit this brief as interested media parties in support of the Interested Parties’ Motion to Be Heard. The Interested Parties also request an opportunity to present argument at or immediately before the January 21, 2025 hearing set to be heard at 10:00 a.m. In the alternative, the Interested Parties request an opportunity to be heard prior to the Court closing of any portions of the January 23 or 24, 2025 hearings to the public. *See The Associated Press v. Second Jud. Dist.*, 172 Idaho 113, 121, 529 P.3d 1259, 1267 (2023) (“both state and federal courts often permit the media to intervene in criminal cases on a limited basis—or at least file a motion as interested parties—in the defense of public access and free speech, including in Idaho.”)

The Interested Parties are national, regional and Idaho-based news organizations and associations of professional journalists that routinely cover, among other things, criminal proceedings in Idaho state courts, and across the nation. The Interested Parties have specifically investigated, reported on, and provided detailed coverage of the facts and circumstances regarding this case, including but not limited to, previous pretrial proceedings conducted by this Court.

Additionally, the Interested Parties, either through direct first-hand accounts, or through information gained by other present press representatives, intend to report on the upcoming hearings scheduled for this week.

On January 15, 2024, this Court issued a Notice of Hearing and Order Regarding January 21, 2025 Hearing. In that Order, the Court set a “closed/sealed” hearing to (1) hear the Defense Motion to Unseal materials related to its request to suppress evidence stemming from the use of IGG DNA, and (2) consider what portions, if any, and under what circumstances, should the various motions set to be heard on January 23rd and January 24th be open to the public either live and/or by video.

DISCUSSION

The United States Supreme Court has long acknowledged that the First Amendment protects the right of the public and the press to attend criminal proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) (*Press-Enterprise II*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558–81 (1980) (plurality opinion). The Supreme Court has extended this First Amendment right of access to criminal proceedings (1) which have historically been open to the press and the public, and (2) where public access plays a significant positive role in the functioning of the particular process in question, known as the “experience and logic test.” *See Press-Enterprise II*, 478 U.S. at 8-9; *see also Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 71 (2001). Where this test is satisfied, a “qualified First Amendment right of public access” exists. *Press-Enterprise II*, 478 U.S. at 9. The right of access is not absolute; it may be overcome by an “overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.*

Under the experience and logic test, the First Amendment right of access has been extended to criminal “pretrial proceedings[.]” *Bradbury*, 136 Idaho at 71 (2001) (citations omitted); *see also Cowles Pub. Co. v. Magistrate Ct. of the First Jud. Dist. of State, Cnty. of Kootenai*, 118 Idaho 753, 756, 800 P.2d 640, 643 (1990) (holding that “in Idaho a qualified first amendment right of public access attaches to preliminary hearings” because they “are presumptively open and considering that openness of preliminary hearings plays a significant positive role in our society[.]”); *Associated Press v. U.S. Dist. Ct. for Cent. Dist. of California*, 705 F.2d 1143, 1145 (9th Cir. 1983) (noting that the Ninth Circuit has “held that the first amendment right of access to criminal trials also applies to pretrial proceedings such as suppression hearings.”); *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (“Examining the substance, it is clear that the considerations supporting the public’s qualified right of access to the criminal trial itself apply as well to hearings on motions to suppress evidence.”).

Generally, prior to closing a criminal proceeding, a court must (1) afford those excluded from the proceeding “a reasonable opportunity to state their objections[.]” *Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990), and (2) comply with the *Press-Enterprise II* requirements. *See Cowles Pub.*, 118 Idaho at 760 (explain that a that the criminal proceeding can only be “closed if the [trial court] makes the specific findings on the record as required by *Press-Enter. II*.”). To do so, a court must make “specific findings on the record” that there is “first, a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent, and second, that reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” *Id.* The Ninth Circuit has explained that under *Press-Enterprise II*, criminal proceedings “may be closed to the public without violating the First Amendment only if three substantive requirements are satisfied: (1)

closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Oregonian Pub*, 920 F.2d at 1466 (noting that this was the “test applied to [the] accused’s right to a fair trial” in *Press-Enterprise II*).

The Interested Parties now seek an opportunity to be heard prior to this Court conducting its closed hearing set for Tuesday January 21, 2025 to raise their objection to the closure of that hearing, and any other subsequent hearings.¹ While the Court’s Order setting the Tuesday hearing unambiguously closed the hearing to the public (and thus, the press), it did not make any specific findings as to the probability that the Defendant’s right to a fair trial would be prejudiced, nor were the Interested Parties provided an opportunity to raise their objections prior to the closure.

Moreover—at least as it pertains to the upcoming discussion on closing the Court’s subsequent hearings—it is unclear how this discussion would prejudice the Defendant’s right to a fair trial or what measures—if any—have been considered in order to protect both the Defendant’s rights and the public’s in a manner that is less extreme than locking out the public altogether. As the Interested Parties understand the issue, it appears unlikely that any potentially confidential information would need to be discussed during the hearing to have a full and frank discussion on the openness of any upcoming hearings. Additionally, as this Court is well aware, this case has undeniable significance to the state of Idaho, and its citizens. As the Supreme Court has explained, “[p]roceedings held in secret . . . frustrate the broad public interest[.]” *Press-Enterprise II*, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984). Conversely, openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public

¹ The Interested Parties further seek to raise their objection to the closure of the January 23rd or 24th hearings. Therefore, in the alternative, the Interested Parties request an opportunity to be heard prior to the closing of any part of those hearings.

confidence in the system.” *Id.* (citations omitted). It is this openness that the Interested Parties seek to ensure so that they can play their vital role as “surrogates for the public” in providing an accurate and unbiased depiction of the upcoming criminal proceedings for which Idaho and its people are deeply concerned about. *See Richmond Newspapers*, 448 U.S. at 573. At a bare minimum, the public should understand why, or what part of, any upcoming proceedings will be closed to the public.

CONCLUSION

For the reasons set forth above, the Interested Parties respectfully request that the Court grant its motion and allow them an opportunity to be heard prior to closing the Tuesday, January 21, 2025 hearing to the public.

DATED: January 21, 2025

STOEL RIVES LLP

/s/ Wendy J. Olson

Wendy J. Olson
Anders Pedersen

Attorneys for Interested Parties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of January 2025, I served a true and correct copy of the within and foregoing **MEMORANDUM IN SUPPORT OF MOTION TO BE HEARD AS INTERESTED PARTIES** upon the following named parties by the method indicated below, and addressed to the following:

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/s/ Wendy J. Olson
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