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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Case No. CR29-22-2805

**Supplemental Memorandum on Camera
Access in the Courtroom**

THE ASSOCIATED PRESS; RADIO
TELEVISION DIGITAL NEWS
ASSOCIATION; SINCLAIR MEDIA OF
BOISE, LLC/KBOI-TV (BOISE); STATES
NEWSROOM DBA IDAHO CAPITAL SUN;
TEGNA INC./KREM (SPOKANE), KTVB
(BOISE) AND KING (SEATTLE);
EASTIDAHONEWS.COM; THE LEWISTON
TRIBUNE; WASHINGTON STATE
ASSOCIATION OF BROADCASTERS;
IDAHO PRESS CLUB; IDAHO EDUCATION
NEWS; KXLY-TV/4 NEWS NOW AND
KAPP/KVEW-TV—MORGAN MURPHY
MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS
MEDIA, INC., DBA KIVI-TV, A DELAWARE

CORPORATION; THE SPOKESMAN-
REVIEW/COWLES COMPANY; THE NEW
YORK TIMES COMPANY; LAWNEWZ,
INC.; ABC, INC.; WP COMPANY LLC, DBA
THE WASHINGTON POST; SOCIETY OF
PROFESSIONAL JOURNALISTS; THE
MCCLATCHY COMPANY, LLC; and THE
SEATTLE TIMES,

Intervenors.

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I. INTRODUCTION

As the Court knows, this case and the murders that preceded it have forever impacted the University of Idaho, Moscow, and the State of Idaho. The people impacted, many of whose lives are forever changed and sense of security undermined, deserve an opportunity to see and hear the court proceedings for themselves, but the realities of everyday life prevent most citizens from attending the proceedings in person. Intervenors, through print and electronic coverage, serve as surrogates or facilitators for those who have been so impacted—and for others who wish to observe their criminal justice system at work. Idaho Court Administrative Rule 45 appreciates that fact, and it allows this Court to authorize “audio/visual coverage” of the proceedings here, subject to carefully crafted rules designed to protect the State’s and Mr. Kohberger’s constitutional interests, the privacy concerns of jurors and trial participants, and the dignity of the courtroom. Audio/visual coverage will provide the best opportunity for impacted community members in Moscow and throughout the state to receive contemporaneous, complete, and objective evidence about this case as it will be presented in the courtroom: in a rational, dispassionate, and orderly manner. Intervenors thus urge the Court to exercise its discretion to allow such coverage.

II. BACKGROUND

In November 2022, four University of Idaho students were murdered at a home near campus. The tragedy caused sorrow and fear throughout the University of Idaho, the Moscow community, the State of Idaho, neighboring Washington, and the nation. The community followed the investigation of the murders closely, many fearing for their safety on or near campus and providing information to law enforcement whenever possible.

In December 2022, Bryan C. Kohberger was arrested and charged for the murders. He has since been indicted, arraigned, and set for trial in October 2023. The community is eager to learn what the evidence shows about Mr. Kohberger and these heinous acts and if his prosecution will

bring closure, and a return to a sense of safety, after this great tragedy. Mr. Kohberger’s trial will likely be the only time when the community can learn directly about any inculpatory or exculpatory evidence, learn about the thoroughness of the investigation or any missteps, assess the fairness of Mr. Kohberger’s prosecution, and evaluate whether this great tragedy has ended. For these and other reasons, this case remains the first case listed on the Judicial Branch’s Cases of Interest, even above the prosecution of Chad Daybell and Lori Vallow.¹

Intervenors are a coalition of media companies that have and will report on Mr. Kohberger’s prosecution. On May 1, 2023, they filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order along with accompanying memoranda. At a May 22, 2023 Scheduling Conference on those motions, the Court invited Intervenors to submit this supplemental memorandum on camera access in the courtroom.

III. LEGAL STANDARD

Recognizing the benefits to the community and the integrity of the justice system, Idaho is more open to media coverage of trials than other states.² It allows “audio/visual coverage” of public district court proceedings, which means “broadcast, video, audio, and photographic coverage” with broadcasting including a wide range of transmissions such as “television, radio, Internet, email or streaming.” Idaho Court Administrative Rule 45(a). Accompany that authorization are many safeguards to maintain confidences, limit dissemination of information that would not be accessible to those attending in person ensuring the right to a fair trial, protect privacy interests, and preserve the dignity of the courtroom. *Id.*

Most important is the presiding judge’s discretion. The presiding judge maintains complete

¹ The Cases of Interest page may be viewed here: <https://coi.isc.idaho.gov/>.

² Cameras in the Courts: A State-by-State Coverage Guide, Radio Television Digital News Association (last visited June 2, 2023), <https://www.rtdna.org/cameras-in-the-courts>.

discretion to allow or limit audio/visual coverage free from appellate review. Idaho Court Administrative Rule 45(b).

IV. ARGUMENT

The many community members throughout the University of Idaho, Moscow, the State of Idaho, and the cities in which the victims' family members reside who are impacted by the heinous crimes committed this past November should have an opportunity to see and hear these proceedings for themselves. Audio/visual coverage will provide the best, most objective opportunity for the many community members who will be unable to attend in person. The Court should thus afford those community members that opportunity, while strictly enforcing (as it must) Idaho Court Administrative Rule 45's safeguards to protect all other interests. The recent prosecutions of Derek Chauvin and Lori Vallow—not to mention Mr. Kohberger's arraignment—show that allowing audio/visual coverage is the right decision, as Mr. Chauvin's conviction after a broadcasted trial was largely accepted whereas Ms. Vallow's conviction after a trial that was not broadcasted is currently being questioned after reports that a juror relied on evidence that was not presented in court.

A. The community's interest in the case, as reflected in the First Amendment, favors allowing camera access.

Public court proceedings are central to our justice system. “[I]t 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, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). As a result, “the right to attend criminal trials is implicit in the guarantees of the First Amendment[.]” *Id.* at 580 (footnote omitted). There is thus a presumption of openness of court proceedings that “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter.*

Co. v. Super. Ct., 464 U.S. 501, 510 (1984).

The First Amendment guarantees this right of access because it “enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.” *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982). “[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *Id.*; see also *Press-Enter. Co.*, 464 U.S. at 508 (“[K]nowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.” (emphasis omitted)).

Access also serves a therapeutic and “prophylactic purpose, providing an outlet for community concern, hostility, and emotion.” *Richmond Newspapers*, 448 U.S. at 571. “Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help[.]’” *Id.*

Considering these many interests furthered by open trials, mere openness to those who can travel to the courthouse is not enough. “Trial courts are obligated to take *every reasonable measure* to accommodate public attendance at criminal trials.” *Presley v. Georgia*, 558 U.S. 209, 210, 215 (2010) (per curiam) (emphasis added) (finding constitutional violation where trial court excluded defendant’s uncle from voir dire because 42 potential jurors would be sitting throughout courtroom and “[t]here just isn’t space for [the public] to sit in the audience”); see also *Davis v. United States*, 247 F. 394, 395, 399 (8th Cir. 1917) (per curiam) (allowing only 25 members of the public to attend a trial when the courtroom could hold 100 spectators was reversible error).

Allowing audio/visual coverage is a reasonable measure that this Court can take to ensure all members of the affected communities have a chance to view Mr. Kohberger’s prosecution. To

be clear, Intervenors are not asserting here that the First Amendment *compels* the Court to allow audio/visual coverage. Intervenors are arguing that the Court *should* exercise the discretion afforded to it by Idaho law to allow more citizens to observe the courtroom proceedings.

Ideally “every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (J., Oliver Wendell Holmes). But the reality is that most people affiliated with the University of Idaho, Moscow, Pullman, and the other communities touched by these crimes, as well as those in Pennsylvania where Mr. Kohberger is from, simply cannot attend the court proceedings in person. The limitations of daily life mean that most citizens must learn about Mr. Kohberger’s court proceedings not by attending themselves, but through the news media. *Richmond Newspapers*, 448 U.S. at 572–73 (recognizing the need for special access by media representatives, who serve as surrogates for the public.).

This case is newsworthy and will be extensively covered by the news media no matter if electronic journalists may use the tools of their trade inside the courtroom. While both print and electronic media serve that important surrogate role, only the electronic media can provide the public with a close visual and aural approximation of witnessing a trial without physical attendance—that is, broadcast comes closest to allowing citizens to observe the proceedings with their own eyes and ears. Permitting recording and telecast, consistent with Idaho law, of the proceedings that take place inside the courtroom will ensure that the information conveyed by the news media to the public is contemporaneous, complete, and objective. Such coverage will convey the evidence as it is received in the courtroom setting—in a rational, dispassionate, and orderly manner.

Without a camera in the courtroom as an objective observer, the public will be forced to rely on the selective summaries of those members of the media who are able to secure a coveted spot in the courtroom. On the other hand, electronic coverage of proceedings allows citizens to have a first-hand view of the case as it proceeds under the control of the presiding judge, and allows them to make their own unfiltered assessments. Given the effect of the crimes alleged on the community at large, it is particularly important that, in order to understand whatever verdict is rendered, the same community be able to see and hear the case presented by the prosecution and the defense. As the U.S. Supreme Court noted, “[p]eople in an open society do not demand infallibility from their institutions, but it [will be] difficult for them to accept what they are prohibited from observing.” *Id.* at 572.

B. Under Idaho Court Administrative Rule 45’s requirements, coverage will be unobtrusive and consistent with the rights of all involved.

Intervenors do not know the State’s or Mr. Kohberger’s position on cameras in the courtroom, but they assume that if either object, it will be because of perceived effects on the right to a fair trial, the privacy interests of witnesses, and courtroom decorum. Idaho Court Administrative Rule 45, which Intervenors of course must and will strictly follow, addresses all those concerns.

If community members are allowed to observe audio/visual coverage of the proceedings, their observations will be no greater than those of community members who are able to attend in person. And a criminal defendant’s right to a fair trial is not infringed when open proceedings are exposed to even more sunshine. Rule 45 does not permit coverage of more sensitive aspects of the proceedings like conferences between Mr. Kohberger and his attorneys, conferences between co-counsel, side bars between counsel and the Court, notes on counsel table, unadmitted exhibits, in-camera sessions, closed proceedings, or judicial deliberations. Idaho Court Administrative Rule

45(c). The Court may also impose limitations on the coverage of the jury, including during jury selection. Idaho Court Administrative Rule 45(h)(1). And if there are any concerns about the acute effect of coverage on a particular witness, then those concerns can be addressed on an individualized basis. Idaho Court Administrative Rule 45(d) (“The presiding judge may exclude audio/video coverage of a particular participant or direct that the identity or audio of a participant be concealed upon a determination that such coverage will have a substantial adverse effect upon a particular individual.”).

There are also rules to ensure coverage has no or minimal effects on courtroom decorum.

For example:

- The news representatives must determine among themselves who will capture photos or recordings and how that coverage will be pooled, if at all, Idaho Court Administrative Rule 45(d);
- No electronic flash or artificial lighting may be used, Idaho Court Administrative Rule 45(h)(2) & (4);
- Camera noise and distractions must be kept to a minimum, Idaho Court Administrative Rule 45(h)(3) & (4);
- No video or television camera may give indication of whether it is operating, Idaho Court Administrative Rule 45(h)(5);
- Media representatives must be in position at least 15 minutes before court begins and shall not change positions while court is in session, Idaho Court Administrative Rule 45(h)(7);
- Media representatives must present neatly and conduct themselves in keeping with the dignity of the court proceedings, Idaho Court Administrative Rule 45(h)(8); and

- Media coverage should be pooled to limit the number of media representatives in the courtroom, Idaho Court Administrative Rule 45(h)(9) & (10).

What is more, allowing coverage will *reduce* the amount of foot traffic, and the corresponding potential for disruption, at the courthouse. The coverage of Mr. Kohberger's arraignment provides a prime example. The Associated Press, just one of the Intervenors, intended to send two or three representatives to cover Mr. Kohberger's arraignment. Declaration of Gillian Flaccus, ¶ 2. But when the Associated Press learned that there would be pool coverage of the arraignment, it instead sent *zero* representatives to attend in person because it knew the pool coverage would provide the information needed to accurately and fairly report on the arraignment. *Id.* Relatedly, Intervenors expect that future proceedings will be at capacity. Allowing cameras in the courtroom will reduce competition for the limited seats and ensure that those who are unable to secure a seat (including reporters) can still observe the proceedings.

To be sure, if cameras are allowed in the courtroom, more impacted community members—including members of the University of Idaho, Moscow, and Idaho communities—will be able to see and listen to the courtroom proceedings with their own eyes and ears. But the existence of more observers should be viewed positively, not negatively. All impacted community members, not just those that have the time and resources to wait in line and attend in person, should have the opportunity to experience the benefits of an open courtroom proceeding. The rights of the trial participants will not be affected, as those listening or watching from afar will not obtain any information that is unavailable in the courtroom. In fact, it would be better for the State and Mr. Kohberger if impacted community members can observe the rational, dispassionate, and orderly presentation of all the facts, rather than relying on repackaging from potentially unethical outlets or anonymous online commentators. Mr. Kohberger would also further benefit from the many

advantages of an open trial. *Richmond Newspapers*, 448 U.S. 555 at 569 (“Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”). The proceedings themselves will be more streamlined, as there will be less need and competition each day to secure a spot outside the courthouse or inside the courtroom. And while Intervenors are confident that it will not happen, if for any reason issues do emerge, the Court can immediately take corrective action. Idaho Court Administrative Rule 45(a).

C. Recent high-profile cases show that the Court should allow camera access.

The recent trials of Derek Chauvin and Lori Vallow show that the Court should allow camera access here.

The criminal trial of Derek Chauvin posed several unprecedented challenges. Few, if any, cases gave rise to social justice movements the size of what George Floyd inspired.³ And it all happened during some of the darkest times of the Covid-19 pandemic. The Hon. Peter A. Cahill presided over Mr. Chauvin’s trial. At the time, he “opposed the use of cameras in the courtroom in criminal cases.” Declaration of Wendy J. Olson, Ex. A. But he ultimately allowed them during Mr. Chauvin’s trial, and that experience “changed [his] opinion such that [he] now believe[s] cameras in the courtroom can be helpful in promoting trust and confidence in the judicial process and are sometimes necessary to safeguard both the defendant’s right to a public trial and the public’s right of access to criminal trials.” *Id.* To be sure, Judge Cahill continues to advocate for careful regulation and the exercise of discretion. *Id.* But in his view, “there should be a presumption

³ Larry Buchanan et al., Black Lives Matter May Be the Largest Movement in U.S. History, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

that cameras be allowed in trials and sentencings.” *Id.*

By contrast, in the recent Lori Vallow trial, the Court did not allow cameras in the courtroom during trial except when the jury returned the verdict. The inability to view audio/visual coverage of the trial did not detract from the public’s interest in the trial. But rather than watching and listening objectively to what occurred in the courtroom, citizens could see only stale images and were entirely dependent on the quality of the reporting from those who were able to access the proceedings. Now, Ms. Vallow is challenging her conviction, arguing that a juror relied on evidence that was not presented in the courtroom. Because most members of the public could not view the proceedings in real time or review recordings of the proceedings now, they are unable to assess for themselves whether Ms. Vallow’s assertions about what was presented are correct. That creates potential doubt, within the community, about the criminal justice system that could have been avoided. Nate Eaton, J Juror Responds After Lori Vallow Daybell’s Attorneys Ask for a New Trial, EastIdahoNews.com (May 30, 2023), <https://www.eastidahonews.com/2023/05/juror-responds-after-lori-vallow-daybells-attorneys-ask-for-a-new-trial/>.

These contrasting experiences in recent high-profile cases show that, as it did at Mr. Kohberger’s arraignment, the Court should at least start by allowing audio/visual coverage. Intervenors are confident that the Court, with the benefit of hindsight, will be satisfied with that decision. And if for any reason issues emerge, again, the Court can take immediate corrective action.

V. CONCLUSION

Intervenors request that the Court allow audio/visual coverage consistent with Idaho Court Administrative Rule 45.

DATED: June 2, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson

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Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 2023, I served a true and correct copy of the within and foregoing upon the following named parties by the method indicated below, and addressed to the following:

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