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

STATE OF IDAHO,

Plaintiff,

v.

BRYAN CHRISTOPHER KOHBERGER,

Defendant.

Case No. CR29-22-2805

STATE'S BRIEF ON VIDEO
AND PHOTOGRAPHIC
COVERAGE

In the State's view, the decision of whether to allow video or photographic coverage of the proceedings in this case is left to the sound discretion of the Court. Idaho Court Administrative Rule (I.C.A.R.) 45. The courts have not held that there is a First Amendment, or other constitutional right of the media to broadcast or photograph a proceeding. In fact, there have been circumstances where the United States Supreme Court has held that extensive broadcasting and photographing of a proceeding to be violative of a defendant's due process rights. See *Estes v. Texas*, 381 U.S. 532 (1965) and *Chandler v. Florida*, 449 U.S. 560 (1981).

As guidance, the State has attached the recent decision by Seventh Judicial District Judge Steven Boyce in the case of *State of Idaho v. Lori Norene Vallow aka Lori Norene Vallow Daybell*, case no. CR22-21-1624. A similar rationale may exist here.

The State would further note that Federal Rule of Criminal Procedure 53 prohibits courtroom photographing and broadcasting, except as otherwise allowed by rule or statute, in federal cases.

The State also has the following concerns about allowing broadcasting or photographing at the trial in this case: 1) the State has a number of sensitive witnesses who would likely be intimidated, harassed, or harmed by a live broadcast of the trial; 2) jurors, unless sequestered, would have off hours access to the broadcast which may include discussions which were outside of the jury's purview; and 3) witnesses would also have access to broadcasts showing the specific testimony of other witnesses.

Finally, if the Court were inclined to allow video or photographic coverage, the State would recommend that the Court control the positioning, location, and zoom of any camera, whether by order or by simply controlling any recording itself, to ensure the camera or photographing is not solely focused on one participant, that it does not capture any sensitive or inadmissible materials, and that it does not subject any trial participant to excessive coverage.

Respectfully submitted this 6th day of June, 2023.



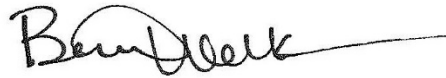
Bradley Rudley
Chief Civil Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S BRIEF ON ISSUE OF VIDEO AND PHOTOGRAPHIC COVERAGE was served on the following in the manner indicated below:

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Dated this 6th day of June, 2023.



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

STATE OF IDAHO

Plaintiff,

v.

LORI NORENE VALLOW aka LORI
NORENE VALLOW DAYBELL,

Defendant.

Case No. CR22-21-1624

**MEMORANDUM DECISION and
ORDER PROHIBITING VIDEO AND
PHOTOGRAPHIC COVERAGE**

Pending before the Court is the Defendant's MOTION TO CLARIFY MEDIA IN THE COURTROOM, filed August 30, 2022, requesting cameras to be banned from future proceedings.¹ On September 8, 2022, several non-party media entities ("Media") sought and obtained permission from the Court to file as Interested Persons a RESPONSE to Defendant's MOTION, arguing the Media had at no time failed to comply with Orders of this Court governing media coverage of in-court proceedings.² On September 12, 2022, the State filed a CONCURRENCE with the Defendant's MOTION.³ On September 15, 2022, the Court heard argument on the issue at a hearing. Having fully reviewed the record, relevant rules, and case law, and upon the request of Counsel, this Court enters the following Order.

I. Background

A sacrosanct protection of the penal system in the United States of America is the insistence of a fair trial by an impartial jury to those accused of even the most severe crimes as set forth in

¹ MOT. TO CLARIFY MEDIA IN THE COURTROOM. Aug. 30, 2022.

² INTERESTED PERSONS' RESPONSE TO DEF.'S MOT. TO CLARIFY MEDIA IN THE COURTROOM. Sept. 8, 2022.

³ STATE'S RESPONSE AND CONCURRENCE TO DEF.'S MOT. TO CLARIFY. Sept. 12, 2022.

the Sixth Amendment of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.⁴

The Court is presented today with a joint request from the Defendant and the State to disallow certain media activity in future courtroom proceedings in this case. Countering that request are several media entities who have argued that the First Amendment affords the media certain rights and that those rights are best achieved by disseminating audio and video coverage of court proceedings.

To be clear, no party has argued that the Court should fully proscribe media coverage of this case by issuing a prior restraint on speech, such as a gag order on media reporting. Rather, the request of the Defendant and the State, in its concurrence, is that the Court clarify or reconsider the scope of the media's activity authorized by the Court's ORDER GOVERNING COURTROOM CONDUCT issued in the case April 14, 2022.⁵

The instant case has garnered significant media attention worldwide. The Court has previously considered the "deluge of publicity" (*Sheppard v. Maxwell*, 384 U.S. 333, 357 (1966)); and upon determining that Idaho Criminal Rule 21(a) and Idaho Code Section 19-1801 applied, the Court ordered a transfer of trial from Fremont County, Idaho, to the most populous county in the State, Ada County, in order to mitigate the effects of pretrial publicity and its detrimental

⁴ See also Idaho State Constitution. Art. I §§ 7, 13.

⁵ ORDER GOVERNING COURTROOM CONDUCT. April 14, 2022.

impact on selecting an impartial jury.^{6 7}

II. Standard of Adjudication

Idaho Court Administrative Rule 45 (“I.C.A.R. 45”) sets forth the procedures and considerations for trial courts to evaluate audio and visual coverage of public proceedings in Idaho courts:

I.C.A.R. 45(a). [...] The presiding judge maintains the right to limit audio/visual coverage of any public hearing when the interests of the administration of justice requires. Authorization may be revoked at any time, without prior notice, when in the discretion of the court it appears that audio/visual coverage is interfering in any way with the proper administration of justice.

I.C.A.R. 45(b) The presiding judge may, at his or her discretion, limit, restrict, or prohibit audio/visual coverage at any proceeding. Any decision regarding audio/visual coverage is not subject to appellate review.

I.C.A.R. 45.

III. Discussion

First, the Court affirms that there is no indication that any orders relating to the conduct of the media during hearings in this case, or the companion case, Fremont County Case No. CR22-21-1623, State of Idaho vs. Chad Guy Daybell, have been violated. The Court has likewise witnessed no misconduct on any part of the media during hearings in these cases. The presence of media during the hearings has in no way interrupted those proceedings, and attending media have been respectful and professional. Notwithstanding, the Court determines that the concerns raised in the Defendant’s MOTION TO CLARIFY MEDIA IN THE COURTROOM and the State’s CONCURRENCE are well founded.

⁶ See Fremont County Case No. CR22-21-1623. MEM. DEC. ON DEF.’S MOT. TO CHANGE VENUE. pp 8-9. Oct. 8, 2021. Those findings are fully incorporated into this decision.

⁷ “The trial judge has a major responsibility . . . the measures a judge takes or fails to take to mitigate the effects of pretrial publicity may well determine whether the defendant receives a trial consistent with the requirements of due process.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 555 (1976).

The Court has carefully considered the arguments presented at the September 15, 2022 hearing on this issue, including the arguments of Mr. Wright, counsel for numerous media clients. Subsequent to the hearing, and upon request of counsel, the Court also reviewed the video footage of an August 16, 2022 hearing, as cited in the State's CONCURRENCE.⁸

The Court concurs with Defendant's argument that the footage of the August 16th hearing demonstrates an inordinate focus on the Defendant, zooming onto her face throughout the vast majority of the hearing, regardless of who was speaking or what was happening. This Court has previously permitted cameras in the courtroom during this case, allowing both photography and video transmission, "[b]ut when the case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551. Further, "[t]he capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity." *Id.* at 554-5. Such is precisely the conflict here.

While the right to public access must be protected, the scope of the coverage cannot supersede the rights of all parties to the fair administration of justice in this case. Courts have historically struggled with the issue of permitting cameras in the courtroom. Going back decades, cases have been overturned by the U.S. Supreme Court because of issues relating to extensive media coverage.⁹ In this day and age, the problem is further exacerbated, where instantaneous access to coverage provided by traditional media outlets is quickly rebroadcast, repackaged, and reimagined. The Court has previously been made aware and continues to be informed that documentaries, dramatizations and fictionalized movies focusing on the Defendants and allegations in this case have already been produced and continue to be disseminated to the public.

⁸ STATE'S CONCURRENCE. p. 2. n.1.

⁹ See e.g. *Estes v. Texas* 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966)

All of this continues to occur in a case which has not yet been tried.¹⁰

The Court is very concerned that continued visual coverage of this case will impede the ability of the parties to select fair and unbiased jurors. While the Court has refrained from delving into viewing the coverage in this case, the coverage is so extensive the Court has had to proactively avoid viewing it, as it is routinely part of local, and at times, national news. The affidavit submitted by Mr. Wright confirms this, in that just one of Mr. Wright's 30+ clients distributes footage from hearings in this case "to dozens of media organizations and millions of viewers..."¹¹

In fully considering this decision, the Court notes that the media have raised a compelling issue: public access for the citizens of Fremont and Madison Counties. The excessive coverage of this case has already resulted in the Court's determination that trial will be held in Ada County, Idaho, as the Court has previously concluded that it would be unlikely to obtain an unbiased jury pool within the home county of this case, Fremont County. It is unfortunate that local citizens, including citizens of both Fremont and Madison Counties, who bear the cost of this case and should be given local access to this trial, should they wish to attend, now cannot do so without inconvenience.

Upon full consideration of the arguments of the State and Defense, notably concurring with each other, the Court is persuaded that further visual coverage of this case will run afoul of the Court's considerations as set forth plainly in I.C.A.R. 45.¹² That rule provides this Court discretion to make this determination. I.C.A.R. 45(a) states, in part: "Audio/visual coverage is authorized subject to the discretion of the presiding judge." I.C.A.R. 45(b) states, in part: "The presiding

¹⁰ In 1976, SCOTUS established "[t]he speed of communication and the pervasiveness of the modern news media have exacerbated [the tension between the First Amendment and Sixth Amendment].

¹¹ DECL. OF GRACE WONG. ¶ 6. Sept. 8, 2022

¹² Agreement between the State and Defense on any issue in a capital case is rare, further confirming to the Court the legitimacy and level of concern counsel have raised.

judge may, at his or her discretion, limit, restrict, or prohibit audio/visual coverage at any proceeding.” The Court determines herein that continued visual coverage of this case poses a great risk to the fair administration of justice in this case, and Co-Defendant Chad Daybell’s companion case, which cases are joined for trial. Therefore, continued visual coverage will no longer be permitted.

The Court determines that this decision applies to all future pre-trial motions and trial. Where continued coverage of pre-trial motions will likely cause potential jurors to be biased, disqualifying them from service, coverage during trial raises additional and equally serious concerns. The Court will not risk the loss of seated jurors who may intentionally or inadvertently review the very trial proceedings they are sworn to decide, where those jurors must make their decision only upon the evidence presented at trial.¹³ The Court will not risk the potential loss of State or Defense witnesses who may intentionally or inadvertently become tainted by viewing the trial proceedings before they testify, assuming their exclusion from the proceedings, as is regularly ordered for material witnesses. The Court further is concerned that at trial the added and unnecessary pressure witnesses and counsel will be subject to, knowing their every expression, utterance and appearance will be captured and circulated without their control in perpetuity, is unwarranted and will likely interfere with the fair administration of justice in this case. Subjecting trial participants, including attorneys and witnesses, to that added pressure may unfairly influence jurors who may incorrectly question credibility based on the reactions to that pressure.

Therefore, in the discretion of the Court, pursuant to I.C.A.R. 45(a) and (b), authorization of all video and photographic coverage in the Courtroom in this case at all further proceedings,

¹³ “The trial judge has a major responsibility . . . the measures a judge takes or fails to take to mitigate the effects of pretrial publicity [] may well determine whether the defendant receives a trial consistent with the requirements of due process.” *Nebraska Press Ass’n*, 427 U.S. 539, 555 (1976).

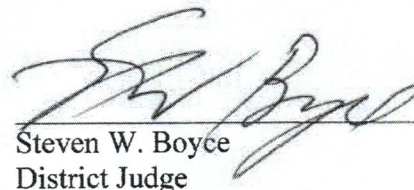
including trial, is revoked. Audio recording of all future proceedings will continue to be permitted, with the Court utilizing the in-courtroom microphones operated by court personnel. Any third-party recording will be subject to future approval, and if approved will be monitored to ensure that microphones are located to ensure that unwarranted conversations between counsel and clients are not recorded. Finally, in order to facilitate the attendance of the trial in Ada County by Fremont County and Madison County citizens who wish to attend, and who have lost the ability to attend in person without great inconvenience, the Court intends to provide enhanced access for Fremont and Madison County residents by providing designated seating at trial in a manner to be further determined.

IV. Conclusion

Defendant's MOTION TO CLARIFY MEDIA IN THE COURTROOM, together with the State's CONCURRENCE and express requests to remove cameras from the courtroom is GRANTED.

IT IS SO ORDERED.

Dated this 23 day of September, 2022.


Steven W. Boyce
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 2022, the foregoing Order was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes; by causing the same to be hand-delivered, by facsimile, or by e-mail.

V.

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Clerk of the District Court
Fremont County, Idaho

by


Deputy Clerk