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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

**Intervenors' Opposition to Motion to
Remove Cameras from 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; THE SEATTLE TIMES; and CNN,

Intervenors.

Intervenors have faithfully followed the Court’s instructions at the June 27, 2023, hearing to not focus exclusively on Mr. Kohberger during audio/visual coverage of these proceedings. The examples provided by Mr. Kohberger in his motion are not representative of actual media coverage, thus the premise of his motion fails. Moreover, continuing to allow audio/visual coverage of the proceedings is the only way to ensure that the many community members affected by these crimes throughout the University of Idaho, Moscow, the State of Idaho, and the cities in which the victims’ family members reside have an opportunity to see and hear the proceedings for themselves. Intervenors have significant experience covering high-profile court cases and will continue to adhere to guidelines set by the Court. The Motion to Remove Cameras from Courtroom should be denied.

BACKGROUND

In June of this year, at the Court’s request, the parties and Intervenors¹ submitted briefing regarding audio/visual coverage of these proceedings. Intervenors urged the Court to exercise its discretion under Idaho Court Administrative Rule 45 to authorize “audio/visual coverage” of the

¹ The following media outlets and entities are part of this Intervenor group: The Associated Press; The McClatchy Company; Scripps Media, Inc.; Radio Television Digital News Association; KXLY-TV/4 News Now and KAPP/KVEW-TV—Morgan Murphy Media KXLY-TV/4 News Now; LawNewz, Inc.; Tegna Inc./Krem (Spokane); Washington State Association of Broadcasters; The Spokesman-Review/Cowles Company; ABC, Inc.; Society of Professional Journalists; the Idaho Press Club; CNN; NBCUniversal News Group, a division of NBCUniversal Media, LLC; KBOI; East Idaho News; and the Lewiston Tribune.

proceedings, 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. Mr. Kohberger, and the State to a lesser extent, urged the Court not to allow cameras in the courtroom.

During a June 9, 2023, hearing, the Court heard argument from the parties and Intervenors, and observed that it had generally allowed cameras in the courtroom during both magistrate and district court proceedings. On June 23, 2023, the Court entered an order reserving ruling on whether to allow cameras in the courtroom. It stated:

The Court is faced with the difficult task of ensuring the proceedings are open to the public while also safeguarding Kohberger's right to a fair trial. The best way to continue to balance those interests is to revisit the issue of cameras in the courtroom as the case unfolds. This Court has the discretion to either allow or disallow video recordings of the proceedings. For now, cameras in the courtroom will continue to be allowed. However, that is subject to change by further order of this Court.

Order Reserving Ruling on the Issue of Cameras in the Courtroom at 2.

At the outset of a hearing on June 27, 2023, the Court instructed still photographers and video camera operators not to focus strictly on Mr. Kohberger if they wished to remain in the courtroom. Intervenors and other long-time media outlets have followed the Court's instructions. Mr. Kohberger, citing a small sample of unrepresentative still photographs, social media posts by persons who are not journalists or Intervenors in this case, and two out-of-context images from a video that plainly show wide camera shots, nonetheless asks the Court to go against its standard practice and remove cameras from the courtroom. And the State now urges the Court not to allow audio/visual coverage at Mr. Kohberger's trial, which is likely many months away.

ARGUMENT

This Court should continue to exercise its discretion to allow audio/visual coverage of these proceedings, including at trial. At all times, Intervenors and other long-time media outlets have

followed the Court’s direction not to focus exclusively on Mr. Kohberger. Mr. Kohberger nonetheless asserts that cameras should be removed because, according to him: (1) their operators failed to comply with the Court’s June 27 instruction because some pictures of just Mr. Kohberger continue to be printed in various publications (Motion to Remove Cameras from Courtroom (“Motion”) at 2); (2) some publications use these photographs with sensational headlines (*id.*); (3) these images provide fodder for non-journalist social media accounts (*id.* at 3); and (4) some camera operators have focused in on papers, documents, or notes located on or around defense counsel table (*id.* at 5-6). Mr. Kohberger’s factual assertions should be rejected, as his examples are not representative of Intervenors’ audio/visual coverage of these proceedings. And his legal analysis of the underlying constitutional issues is flawed because the primary case he relies on, *Estes v. State of Texas*, 381 U.S. 532, 535 (1965), focused on the number of cameras and the obtrusiveness of cameras in the courtroom, which are antiquated concerns over 50 years later when cameras are smaller, and footage can be pooled. In short, Mr. Kohberger’s arguments fail both factually and legally. His Motion should be denied.

1. *Estes v. State of Texas* Does Not Support Removing Cameras from the Courtroom.

In *Estes*, the U.S. Supreme Court was concerned about the impact the number of cameras and obtrusiveness of camera equipment had on the proceedings. 381 U.S. at 536. At times, there were 12 camera operators in the courtroom with large, noisy equipment that required cables strewn throughout the courtroom. *Id.* The Supreme Court concluded that the camera coverage so distracted *trial participants* as to deprive Mr. Estes of a fair trial and reversed his conviction. Here, nearly sixty years later, the media presence inside the courtroom is neither as numerous nor as physically imposing. Intervenors and other long-time media outlets use pool photographers and video camera operators, thereby limiting the number of cameras in the courtroom and sharing the

images. Declaration of Rebecca Boone (“Boone Decl.”), ¶¶ 8-16, 20-29. In addition, the camera equipment is dramatically smaller and quieter than it was in 1964 during the *Estes* trial. *Id.* at ¶ 15. Camera operators and their equipment are set up well in advance of any hearing, rather than being carried in and out during the trial. This allows the cameras and operators to become just another piece of furniture, disappearing into the background. *Id.* Finally, Mr. Estes’s conviction was overturned because the Supreme Court found the camera operators conduct was distracting for the people *inside the courtroom*, not because the coverage was receiving attention *outside of the courtroom*, which is Mr. Kohberger’s argument here. Motion at 3-4.

The Supreme Court recognized the limitations of *Estes* in *Chandler v. Florida*, 449 U.S. 560 (1980). In *Chandler*, the Supreme Court noted that *Estes* did not announce a constitutional rule that all photographic and television coverage of criminal trials is inherently a denial of due process, *id.* at 570-73, and it did not stand as an absolute ban on state court’s experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 when *Estes* was decided, *id.* at 573-74. Cameras and technology have evolved even further in the 43 years since *Chandler* was decided.

2. Courtroom Camera Coverage Has Not Focused Exclusively on Mr. Kohberger and Has Been Fair and Balanced.

The pool photographers and camera operators in the courtroom for the June 27, 2023, and subsequent hearings have followed the Court’s instructions not to focus exclusively on Mr. Kohberger and to show wide shots of the courtroom. For example, Court TV’s coverage of the August 18, 2023, hearing in this case showed a wide angle of the courtroom, focused on the expert called by the defendant when he testified, and occasionally filmed closeups of various participants,

including the Court and Mr. Kohberger.² Declaration of Grace Wong (“Wong Decl.”), ¶¶ 25-26. An Idaho Statesman story about the hearing included a photograph of the expert, as well as photographs of Mr. Kohberger and one of his attorneys and of Latah County Prosecutor Bill Thompson. Declaration of Wendy J. Olson, ¶ 2, Exhibit 1. Similarly, a KTVB story covering the August 23, 2023, hearing showed a variety of camera shots, including: (a) a broad shot that showed the entire courtroom, both counsel tables and the bench; (b) a closeup of the judge; (c) a slightly zoomed in shot of Mr. Kohberger and his counsel in which the zoom feed also could be seen; (d) still shots of the victims; and (e) an interview of a legal analyst.³

ABC News/Good Morning America coverage in August included a variety of shots of the courtroom and the defendant with still photographs and stock footage of earlier developments in the case. The coverage also provided balanced coverage of the State’s and Mr. Kohberger’s positions on the motion before the Court. These stories did not focus exclusively on footage or closeups of Mr. Kohberger.⁴ ABC News has consistently shown a variety of photographic images and footage and provided balanced coverage of the matters addressed in Court.⁵

² The coverage can be viewed at <https://we.tl/t-2V2zpgvo4b>.

³ The coverage can be viewed at <https://www.ktvb.com/video/news/special-reports/moscow-murders/idaho-murder-suspect-bryan-kohberger-waives-right-to-speedy-trial/277-6d5bd2f3-3be6-44b0-8200-c2dd5770a4e2>.

⁴ The coverage can be viewed at <https://twitter.com/GMA/status/1694677364947456411> and <https://www.goodmorningamerica.com/News/video/defense-requests-pause-accused-idaho-killer-bryan-kohberger-102391530>.

⁵ The coverage can be viewed at <https://abcnews.go.com/US/idaho-college-killings-suspect-first-arrested-2014-records-show/story?id=100394285> (print piece does not focus exclusively on Mr. Kohberger) and <https://twitter.com/GMA/status/165082765222320648> (Apr. 25, 2023, Good Morning America package on surviving roommate subpoena in which video edits largely use wide shots of courtroom, demonstrate discretion with visuals of defense counsel table and in which language used in track demonstrates straightforward, fair, and balanced approach to potential “exculpatory evidence”).

Although video camera operators have done their best to capture the full courtroom and not focus exclusively on Mr. Kohberger when they zoom in to provide focus on who is speaking, the courtroom has natural limitations. It is not a football field. But even the screenshots and photographs in Mr. Kohberger's Motion show that the video journalists were endeavoring to include as much of a wide shot as possible. They show both the subject of the trial and the projector screen showing the judge and the courtroom gallery. Motion at 6. And Mr. Kohberger's Motion is inaccurate when it argues that the pool cameras have scrutinized defense counsel table. Motion at 5-6. Only one of the photographs in Mr. Kohberger's Motion even shows a full view of defense counsel table with some papers on it. *Id.* at 6. The print, if any, on the papers is not viewable, nor are the papers the focus of the shot. *Id.* The image simply shows the personnel at defense counsel table without any effort to zoom in or scrutinize the documents on defense counsel table. Nor does any of the media coverage referred to above show the content or substance of any materials on defense counsel table. That is simply not accurate.

To be certain, some editors choose to print photographs of Mr. Kohberger to accompany stories their reporters write about the proceedings in this case. But that is the decision of persons outside of the courtroom and not the result of still photographers and video camera operators inside the courtroom focusing exclusively on Mr. Kohberger. The 18 still photographs posted by the pool photographer from the Lewiston Tribune from the August 18 hearing included a variety of images of the hearing participants, including all counsel, Mr. Kohberger, the Court and court reporter, and various witnesses. Boone Decl., ¶¶ 17, 18, 22. That news editors used photographs of Mr. Kohberger alone or of Mr. Kohberger and others does not mean that the cameras in the courtroom focused only or primarily on Mr. Kohberger. And media outlets could continue to make the

editorial choice to depict Mr. Kohberger with their stories on the case using stock photographs from earlier proceedings even if cameras are not in the courtroom.

Finally, neither the Court nor Intervenors can control the social media users who take the still photographers' and video camera operators' images and post them online with unflattering content. That appears to be what happened in the social media image Mr. Kohberger included on page 3 of his Motion. Mr. Kohberger argued that he is "entitled to defend himself against capital charges without cameras focused on his fly" (Motion at 5), but no photographs or camera coverage focused on Mr. Kohberger's "fly." Rather, one random X user (formerly Twitter) modified a photograph showing Mr. Kohberger and a deputy entering the courtroom by cropping it to a very small size, focused on his belt, and adding a reference to Mr. Kohberger's fly. *Id.* at 3. Even the cropped photograph does not focus on Mr. Kohberger's fly, however. And Intervenors and the members of the public who are interested in but unable to attend these proceedings should not have their access to live court proceeding curtailed simply because of social media posts made by one or a few unknown and unaffiliated individuals.

Intervenors seek to continue their principled courtroom coverage of Mr. Kohberger's case, complete with first-hand visual accounts, and to continue using the editorial judgment their organizations have used responsibly according to high journalistic standards.

4. Removing Cameras from the Courtroom Would Have Negative Impacts.

Removing cameras from the courtroom would have at least three negative impacts. First, it would force more news organizations to travel to Moscow to set up cameras outside of the courtroom, creating a much more visible media presence for the case just as it did in the trial of Lori Vallow Daybell in Boise. Boone Decl., ¶¶ 30-36, Exhibit A. At Ms. Daybell's trial, cameras were not allowed in the courtroom, and instead numerous media outlets sent their own still

photographers and camera operators to set up outside the courtroom to do stand-up shots with reporters who had been in the courtroom for various proceedings and to capture various trial participants going to and from the courtroom. *Id.* at ¶¶ 35-36, Exhibit A.

Second, removing cameras from the courtroom will not impede or diminish media coverage of Mr. Kohberger’s case, but it will lead to a significantly less accurate portrayal of the justice process. *Id.* at ¶¶ 20, 37. It will allow the pot-stirrers on social media platforms to promote their made-up claims with no video coverage that can be used to dispute them with the truth of the proceedings. The social media coverage will inevitably turn further away from fact, if cameras are banned, and turn to rampant speculation to fill the void. Allowing cameras in court is an essential step in controlling the flow of accurate information.

Third, removing cameras from the courtroom would make this case of significant public interest less accessible to the community members and family members who suffered trauma as a result of the November killings, and seek closure and healing. It would deprive the public of the opportunity to observe first-hand how the criminal justice system is working in this case. Public oversight provides “significant community therapeutic value,” including an “outlet for community concern, hostility and emotion.” *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (camera access permits the press to report fully on judicial proceedings, serving as a surrogate for the public, most of whom cannot attend personally).

In addition, polls show increasing support for cameras in the courtroom, including at the U.S. Supreme Court. A C-SPAN/Pierrepoint poll found that 70% of voters agree that allowing television coverage of Supreme Court proceedings would build trust in the Court’s process and the rulings it makes. C-SPAN, C-SPAN/Pierrepoint Supreme Court Survey 2022 (Mar. 15, 2022),

<https://www.c-span.org/scotussurvey2022/>. More and more courts are enacting rules allowing cameras in the courtroom.

In 2018, the Georgia Supreme Court approved a rule allowing cameras in the courtroom and clarified the limited circumstances under which the court can prohibit visual and audio recordings. Supreme Court of Georgia (Feb. 6, 2018), https://www.gasupreme.us/wp-content/uploads/2018/02/USCR_22_Order-FINAL_Feb-6.pdf. The Georgia Supreme Court’s press release announcing the rule underscored the importance of video coverage of court proceedings in promoting the integrity of the judicial system: “As the new rule underscores at the outset, ‘Open courtrooms are an indispensable element of an effective and respected judicial system.’ The rule recognizes that a balance must be struck in the use of recording devices in courtrooms: ‘It is the policy of Georgia’s courts to promote access to and understanding of court proceedings not only by the participants in them but also by the general public and by news media who will report on the proceedings to the public. This must be done, however, while protecting the legal rights of the participants in the proceedings and ensuring appropriate security and decorum.’” Supreme Court of Georgia, New Rule Approved for Use of Recording Devices in Courtrooms (Feb. 6, 2018), <https://www.gasupreme.us/new-rule-22/>. Washington State has long had general rules allowing cameras in the courtroom during court proceedings. Washington State Court Rules, GR 16. And although Minnesota state courts ordinarily did not allow cameras in the courtroom, the presiding judge in the Derek Chauvin trial allowed cameras in light of the pandemic, and after the successful public trial, the Minnesota Supreme Court subsequently changed its rules to expand camera access in the future. Wong Decl., ¶¶ 5-9.

Intervenors such as CNN and Court TV have experience televising high-publicity, high-stakes trials, and doing so in the least intrusive manner possible. *Id.* at ¶¶ 3-4, 10-24. Significantly,

not all of these trials have resulted in conviction of the defendant, despite the live coverage and extensive publicity. *Id.* at ¶¶ 11-22. Court TV, and other Intervenor media outlets, seek to follow guidelines set by the Court and to ensure that live coverage complies with Idaho Court Administrative Rule 45 and other concerns of the Court. *Id.* at ¶¶ 2, 27-28.

Finally, this Court, for now, should deny or reserve ruling on the State's suggestion in its responsive pleading that the Court should not allow audio/visual coverage of the courtroom. Intervenors well understand the State's concern for the well-being of witnesses, particularly in a case such as this one that has had a dramatic impact on the university community from which many of the witnesses will be drawn. But it is not the news coverage of court proceedings that has caused witnesses to be threatened or harassed, just as the decision to arrest a suspect or to prosecute Mr. Kohberger have not caused witnesses to be threatened or harassed. And Intervenors trust that the Latah County Prosecuting Attorney will properly address any such threats or harassment.

Other Idaho courts have allowed audio/visual coverage of trials with sensitive witnesses, and, when the Court has so instructed, the audio/visual journalists have followed Court guidelines not to film that witness. Boone Decl., ¶¶ 38-42. For example, during the rape trial of former Lewiston Rep. Aaron von Ehlinger, photograph and video cameras were allowed in the courtroom, and camera operators followed the judge's instructions not to record the victim's testimony. *Id.* at ¶ 39. The young woman had been subjected to extensive and sustained harassment and threats by von Ehlinger's supporters. In the rape trial of Jeffrey Marsalis, camera operators were allowed to record audio of the victim's testimony and visuals of other people in the courtroom reacting to that testimony, including Marsalis. *Id.*, at ¶¶ 41-42.

In addition, cameras were allowed in the courtroom when family members of victims – including their young siblings – testified in the Florida case of Nikolas Cruz, who was convicted of killing 17 people in a shooting at Marjory Stoneman Douglas High School in 2018.⁶

Indeed, Idaho Court Administrative Rule 45(d) contemplates precisely this kind of coverage of particularly sensitive portions of a trial. It provides:

The presiding judge may exclude audio/visual coverage of a particular participant or direct that the identify or audio of a participant be concealed upon a determination that such coverage will have a substantial adverse effect upon a particular individual. It is expected the presiding judge will exercise particular sensitivity to victims of crime.

Just as Intervenors have followed the Court’s instruction not to focus exclusively on Mr. Kohberger, they will follow the Court’s instruction regarding any particular witness. Intervenors are eager to work with the Court and counsel to ensure continued public viewing of the proceedings while taking into account the Court’s and counsel’s concerns. Intervenors’ prior experience covering high-profile criminal trials has made them well aware of the need for an ongoing dialogue and adjustments to coverage based on concerns such as the privacy rights of individual witnesses. They seek to remain part of that ongoing dialogue as they have been in courthouses across the country. Certainly, at this juncture of the proceedings, there is no basis to preclude audio/visual coverage of the trial, which is likely many months away.

⁶ Coverage of this witness testimony can be found at <https://apnews.com/article/entertainment-sports-education-movies-florida-9d87c439c291633716fe08246cd7b618>.
<https://apnews.com/article/education-florida-fort-lauderdale-parkland-school-shooting-nikolas-cruz-07073f4057a46630d09ccba695ff340a>
<https://apnews.com/article/sports-shootings-education-florida-fort-lauderdale-bbb4f1f0317413afbe14a51e90fcdf17>

CONCLUSION

For the reasons set forth above, this Court should deny the Motion to Remove Cameras from Courtroom and at this point deny the State's suggestion that the Court should not allow audio/visual coverage of the trial.

DATED: September 8, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson _____

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Cory M. Carone

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of September 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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