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**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,

vs.

LORI NORENE VALLOW
AKA LORI NORENE DAYBELL,

Defendant.

Case No.: CR22-21-1624

**STATE'S RESPONSE CONCURRING
WITH DEFENDANT VALLOW-
DAYBELL'S MOTION TO CLARIFY
MEDIA IN THE COURTROOM**

The State of Idaho concurs with Defendant Vallow-Daybell's Motion to Clarify Media in the Courtroom and requests that all unsealed, open Court proceedings against both the Defendant Vallow-Daybell and her Co-Defendant Daybell remain open to the public; but that no third-party cameras or recording devices be allowed in the courtroom(s). In the alternative, the State requests the Court consider restrictions on the use of third-party cameras and recording devices to ensure the rights to a fair trial are protected for all parties. In support of its concurrence, the State explains as follows:

STATEMENT OF THE FACTS

The circumstances surrounding the deaths of Tylee Ryan, J.J. Vallow and Tamara Douglas Daybell and the corresponding prosecutions of the Defendants have garnered unprecedented media

STATE'S RESPONSE AND CONCURRENCE
TO DEFENDANT'S MOTION TO CLARIFY

and public attention. The Court, respecting public interest and right to access to the courts, has allowed cameras in courtroom proceedings against both Defendants on multiple occasions. One such instance was a pretrial hearing on August 16, 2022. Unfortunately, the specific audio/visual coverage and equipment used at the August 16, 2022, hearing was installed without notice to the parties themselves. The location and usage of the equipment may have resulted in revealing or recording communications among counsel, communications between counsel and the Defendant, and may have interfered with the proper administration of justice.

Representatives of the media made an application under Idaho Court Administrative Rule (ICAR) 45 for a camera in the courtroom for the hearing held on August 16, 2022. The State was not given notice of the application or any proposed departures from ICAR 45 prior to the order being signed. Since the hearing date, the State has learned of potential departures from the Court's previous practices and potential deviations from ICAR 45 itself with regard to the equipment and practices in the courtroom on August 16, 2022.

Presence of Two Microphones at Counsel Table

On August 16, 2022, Mr. Wood and Ms. Blake appeared for the State to respond to various motions filed by the Defendant. Both sat at counsel table for the State of Idaho. Mr. Archibald, Mr. Thomas and the Defendant likewise appeared at the Defense table to address the same motions. Both counsel tables held the traditional microphone used by the Court to amplify the voices of counsel allowing the Court, the court reporter and the public to hear counsel when they addressed the Court. The Court's microphones afforded the parties the ability to mute their own microphone and to prevent potential public disclosure of private, confidential or privileged communications among the respective team members. Unbeknownst to Counsel for the State, the media controlling the centralized audio/visual equipment had taped a separate recording/microphone device to the courtroom's standard microphone.¹ Just prior to the start of the August 16, 2022, hearings, a Fremont County law enforcement officer drew Mr. Wood's attention to the second microphone taped to the Court's microphone on the State's table. Even accepting Ms. Wong's declaration that

¹A similar microphone appeared to be attached to the Courtroom microphone on Defendant's table as viewed on <https://www.eastidahonews.com/2022/08/watch-live-lori-vallow-daybell-appears-in-court-as-attorneys-argue-indictment-language>. The State defers to Defense Counsel as to their advance knowledge of a second recording device on their counsel table.

the microphones were not placed surreptitiously, the size, color, and location of the microphone was such that it was not noticed until pointed out by the law enforcement officer.

The parties had no method of muting the second microphone which resulted in them having no method of preventing the media from listening to their internal, private communications. Mr. Wood was assured that the media agreed not to listen to the additional microphone when court was not in session – while they had the capacity to do so. The State does not have evidence, nor is the State alleging that members of media in fact listened to its confidential conversations and the public recordings of the hearings reviewed so far do not contain such conversations. However, the location of the second microphone and inability to mute the media microphone on counsel table gave the media the ability to hear what would otherwise be confidential. The State was not told whether the microphone was merely to amplify sound or was attached to an actual recording device that ran consistently through the day capturing and recording all communications among each team. The presence of the microphone in a location where confidential communications occur is a departure from the traditional practices and fundamentally impacts the parties’ right to a fair trial.

Presence of Additional Camera(s) or Solely Focused on One Party/Counsel Table

On August 16, 2022, an additional camera was positioned in Court both in front of and directly focused on the Defendant Lori Vallow-Daybell during the entirety of the day’s hearings.² Throughout the argument on each motion, that specific camera remained on Ms. Vallow-Daybell – often zooming in on her. The camera recording Defendant Vallow-Daybell was the image subsequently displayed to the public for the vast majority of the televised and recorded hearing. The camera remained on the Defendant constantly -- even when Counsel for either side was speaking, when the Court was speaking, and when the Defendant was interacting with her counsel in circumstances that should have been confidential.³ The camera angle used did not simply capture the proceedings for public information -- it centered on the Defendant in a manner exceeding the capabilities of regular attendees. The use of such an image, camera angle and footage, which focused almost solely on one party, exceeds the normal practice of allowing the

² It is unclear from the footage available on the Court’s and media YouTube channels how many cameras were positioned in the courtroom on August 16, 2022 – though it is obvious there are at least two.

³ See footage at <https://www.eastidahonews.com/2022/08/watch-live-lori-vallow-daybell-appears-in-court-as-attorneys-argue-indictment-language>.

public access to hearings and arguments of counsel. Indeed, such camera usage and images derived there from could lend to the appearance of targeting one side of the case for purposes inconsistent with the proper administration of justice.

LAW AND ARGUMENT

I. The Right of the Public and Media Access to the Courtroom is Presumed but Does Not Include Unfettered Use of Recording Equipment

The State recognizes and supports the rights of the State and the Defendant to public hearings on criminal matters. Government transparency – especially in the administration of justice -- is a cornerstone of our Democracy. Public hearings typically afford both parties protection and communication with the people they serve.

The State acknowledges the right of the public to access the criminal justice system. Public access to the judicial system is fundamental to the public’s confidence in the system’s legitimacy. The United States’ Supreme Court held “that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated’.” *Richmond Newspapers, Inc. v. Virginia*, (1980) 448 U.S. 555. 579 100 S.Ct. 281465 L.Ed.2d 973 (1980) [quoting *Branzburg v. Hayes*, 408 U.S. 665 at 681(1972).]

The State’s response and concurrence with the Defendant’s motion does not include any request to limit the public access to the courtroom unless matters are sealed by court order under the law given their prejudicial, confidential or statutorily sensitive nature. Indeed, the State asserts the courtroom must remain open to the public absent a showing of good cause for closure. However, as guaranteed by the First Amendment, public access to the courtroom and proceedings is fundamentally different than, and does not include the unfettered use of audio/visual equipment

by the media or third parties. Use of methods of recording is a privilege afforded the media by the courts when the recording does not impact on the rights of litigants to a fair, impartial trial.

II. Idaho Court Administrative Rule ICAR 45 Outlines the Process and Restrictions on the Use of Camera in the Courtroom.

The Court has broad discretion in allowing the audio/visual coverage of proceedings within a judicial district. Use of cameras in the courtroom is governed by ICAR 45. ICAR 45 (a) and (b) state:

[a] ... Audio/visual coverage is authorized subject to the discretion of the presiding judge. 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.

[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.

Once the Court permits the visual or audio recording of a hearing by the media the Court loses any authority to regulate the subsequent use of the recording by the public – even when one or more parties’ rights to fair trial are at risk. Pursuant to ICAR 45(h) once a Court allows a video camera in the courtroom, the Court is not allowed to include any “restriction on the time when, the place where, or the manner in which the content of the audio/visual coverage may be aired or published.” Simply put once a proceeding is recorded or aired, the Court cannot limit how or what is done with that third-party recording. Given the vast amount of attention on the Defendants’ case, the potential for abuse and public misuse directly impacts on the parties’ right to fair trial. The risk is great that excessive prejudicial pretrial publicity will negatively impact the parties’ right to trial created by the improper use of camera and audiovisual equipment in sensitive pretrial hearings.

Placing a recording device on counsel tables, potentially violates ICAR 45(c). ICAR 45(c) expressly prohibits:

- 1) There shall be no broadcast, video or audio coverage or recording of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench. There shall be no audio/visual coverage of notes upon the counsel table, nor of any exhibits before they are admitted into evidence.
- (2) There shall be no audio/visual coverage of in-camera sessions or judicial deliberations.

When a court authorizes audio/visual coverage in a courtroom, ICAR (h) provides guidelines for the use of the equipment. ICAR (h)(6) outlines that audio equipment is to be placed in the courtroom as determined by the presiding judge and prohibits the broadcast of confidential communications. Nothing in the Court's "Administrative Order 2022-09," Order of "April 14, 2022, Governing Courtroom Conduct," and Order of "August 3, 2022, granting media's Rule 45 request," permit the placement of microphones in locations capable of recording communications among co-counsel or between the Defendant and her counsel. No part of Rule 45, the Court's prior orders or any aspect of the Court's prior practice put the State on notice of the presence of additional microphones and the use of extra cameras.

In the case before the Court, both Lori Daybell's legal team and the State's legal team include multiple attorneys. It is commonly necessary for co-counsel to confer with the client or other attorneys while at counsel table even when one team member is presenting argument. In the Declaration of Grace Wong, she states that all microphones are muted "except for the one person then speaking on the record." Even accepting this is true, this microphone placement would still allow for the recording of co-counsel while one attorney is arguing. For example, if Ms. Blake is presenting argument and Mr. Wood and Ms. Smith need to confer about her comments, the Court TV microphone on that table is recording and would record that conversation in violation of ICAR 45. Similarly, if Mr. Archibald is presenting argument and the Defendant has a question or comment and confers with Mr. Thomas, that conversation would be recorded by Court TV's microphone. The presence of microphones placed by Court TV has a chilling effect on the parties that bars proper communication during argument. IRAC 45 cannot be read to allow for the conduct of counsel or litigants to be chilled or impinged upon by equipment for the sole use of third parties.

CONCLUSION

The Vallow/Daybell case has garnered widespread media attention across the Country. The whole State of Idaho has been inundated with media coverage regarding the children of Lori Vallow and the dead spouses of both Defendants. Picking a fair and unbiased jury is always a difficult process. Broadcasting or live streaming the presentation of arguments, hearings and testimony has the potential of exacerbating prejudice to all parties. Whereas the Court has the absolute and sole authority to decide if audio/visual equipment are allowed in the courtroom, the State urges the Court to reconsider its Order Governing Courtroom Conduct and disallow such actions in the Court. The State asserts that the public access to the courts, including members of the media, means only the ability to attend court in person. In the alternative, the State requests that the Court limit the camera usage to a single still camera that cannot record audio, or to limit a camera to the back of the courtroom facing the witness box without impinging on counsel table.

DATED this 12th day of September, 2022.

/s/ Lindsey A. Blake
Lindsey A. Blake
Prosecuting Attorney

/s/ Rob H. Wood
Rob H. Wood
Prosecuting Attorney

CERTIFICATE

I HEREBY CERTIFY that on this 12th day of September, 2022, that a copy of the foregoing STATE’S RESPONSE AND CONCURRENCE TO DEFENDANT’S MOTION TO CLARIFY was served as follows:

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By: /s/ Jodi L. Thurber
