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Attorneys for Intervenors

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

**Declaration of Wendy J. Olson in Support
of 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.

I, Wendy J. Olson, declare and state as follows:

1. I am a partner with the law firm of Stoel Rives LLP, counsel for Intervenors in the above-captioned matter. As such, I have personal knowledge of the facts and statements contained in this declaration.

2. Attached hereto as **Exhibit A** is a true and correct copy of a letter submitted to Minnesota's Advisory Committee on the Rules of Criminal Procedure.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED: June 2, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson

Wendy J. Olson

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:

Latah County Prosecutor's Office
William W. Thompson, Jr.
Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow, ID 83843

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☐ Via Facsimile
☐ U.S. Mail
☐ Via email
☒ Via iCourt efile & serve at:
paservice@latahcounty.id.gov

Anne Taylor
Attorney at Law
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/s/ Wendy J. Olson

Wendy J. Olson

EXHIBIT A

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

PETER A. CAHILL
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0422
(612) 596-8733
peter.cahill@courts.state.mn.us



January 28, 2022

To the Advisory Committee on the Rules of Criminal Procedure

Re: Cameras in the courtroom

Thank you for the opportunity to comment on potential modifications to the rules governing cameras in the courtroom. My comments are limited to the use of cameras in criminal cases.

As a district court judge, I have opposed the use of cameras in the courtroom in criminal cases, but my recent experience in *State v. Chauvin* has changed my opinion such that I now believe 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. I am not, however, a proponent of removing all limits on the use of cameras. Instead, I believe the use and limitations on cameras in criminal cases should be left primarily to the discretion of the trial judge presiding over an individual case. As trial judges, it is our responsibility to manage hearings and trials such that dignity and decorum are maintained while constitutional rights and Due Process requirements are respected. As part of that process, cameras can facilitate effective trial management in the right case but might be unnecessary or inappropriate in other cases. While parties certainly should have input into the court's decision, the party-consent provision that is currently in the rules should be eliminated.

A trial court judge's discretion should not be completely unfettered and should be subject to certain presumptions and prohibitions. For example, I believe that there should be a presumption against broadcasting pretrial hearings. Those hearings will often involve litigation about evidence that might ultimately not be admissible and the possibility that potential jurors could be inadvertently exposed to such excluded evidence should be limited as much as possible before trial. On the other hand, there should be a presumption that cameras be allowed in trials and sentencings. Jurors are routinely ordered to avoid media coverage once jury selection begins, and my experience, based on post-trial discussions with jurors, is that jurors regularly follow that order. To guide trial judges in deciding whether cameras will be allowed, factors

should be listed in the rule, including whether there is high public interest in the trial, whether security or public health concerns exist that would merit restriction of observers from the physical courtroom itself, and whether the use of cameras would promote transparency and public access.

If cameras are allowed, limitations should be placed in the rule concerning what proceedings should be limited to audio coverage only or not broadcast at all. Jurors should never appear on video. No minor witnesses should appear on video. No criminal sexual conduct victims should appear on video or audio. Autopsy photos or video should never be broadcast outside the courtroom. The same should be true for any exhibits that are extremely graphic or emotionally disturbing.

Finally, as you can tell from my order in *State v. Chauvin* (attached), details matter, and the trial judge should have wide discretion over the choice of the pool camera vendor and the procedures to be followed during the trials or hearings. A single person claiming to be a member of the media who just wants to prop a camera up in the courtroom would be distracting and not meet the goal of cameras being unobtrusive. To effectuate all the detailed procedures that should be a part of any court order allowing cameras, only experienced and professional media sources should be utilized.

Thank you again for allowing me to share my thoughts.

Sincerely,

Peter A. Cahill
Judge of District Court

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

**DEREK MICHAEL CHAUVIN,
TOU THAO,
THOMAS KIERNAN LANE,
J. ALEXANDER KUENG,**

Defendants.

**ORDER ALLOWING
AUDIO AND VIDEO COVERAGE
OF TRIAL**

Dist Ct. File 27-CR-20-12646
Dist Ct. File 27-CR-20-12949
Dist Ct. File 27-CR-20-12951
Dist Ct. File 27-CR-20-12953

This matter came before the Court on June 29, 2020 and September 11, 2020, on Defendants' motions for audio and video broadcast of the trial(s) in these cases.

Matthew Frank, Assistant Attorney General, appeared on behalf of the State of Minnesota at the June 29, 2020 hearing. Keith Ellison, Minnesota Attorney General, Matthew Frank, Assistant Attorney General and Neal Katyal, Special Assistant Attorney General, appeared on behalf of the State of Minnesota at the September 11, 2020 hearing. The State does not consent to audio or video coverage of any trials in these cases.¹

Eric J. Nelson, Attorney at Law, appeared on behalf of Defendant Chauvin. Robert M. Paule and Natalie R. Paule, Attorneys at Law, appeared on behalf of Defendant Thao. Earl P. Gray, Attorney at Law, appeared on behalf of Defendant Thomas Lane. Thomas C. Plunkett,

¹ The State filed its July 27, 2020 letter stating this position into all for cases. *See, e.g., Chauvin*, 27-CR-20-12646, Dk # 62; *Thao*, 27-CR-20-12949, Dk # 66; *Lane*, 27-CR-2012951, Dk # 76; and *Kueng*, 27-CR-20-12953 Dk # 70.

Attorney at Law, appeared on behalf of Defendant Kueng. All Defendants were present at the June 29 and September 11, 2020 hearings, with Chauvin appearing remotely via Zoom at the June 29, 2020 hearing. All Defendants have requested audio and video broadcast of the trial pursuant to Rule 4.02(d) of the Minnesota General Rules of Practice for the District Courts.

Based upon all the files, records, and proceedings, the Court makes the following:

ORDER

1. The joint jury trial to be held in the above-captioned cases commencing March 8, 2021 may be recorded, broadcast, and livestreamed in audio and video subject to the conditions listed below.
2. Audio and video recording, broadcasting, and livestreaming will be allowed only from Courtroom 1856, the trial courtroom, of the Hennepin County Government Center and only during trial sessions. Only matters that are on the record are subject to audio coverage. Sidebar discussions among the Court and counsel will be presumed to be off the record unless the Court indicates otherwise. Off the record matters may be covered by video, but only when the judge is on the bench and the trial is in session.
3. No video photography, still photography, or audio recording may be conducted in any other Hennepin County Government Center location where the use of recording devices is otherwise prohibited.
4. Up to three video cameras may be installed in the trial courtroom: one in the back of the courtroom facing the witness stand, one on the wall behind the jury box, and one on or near the bench facing the lectern where counsel examines witnesses. After installation before the beginning of trial, cameras will not be moved from their fixed positions.

5. Video cameras will be installed and operated by a single media organization (“Pool Producer”), selected by the Court, that is experienced in televising court proceedings.

The Pool Producer will also be responsible for producing a single transmission feed to the Court for use in overflow courtrooms and to media outlets for recording, broadcasting, and livestreaming. The Pool Producer will not be compensated for its operation of the cameras and production of the single transmission feed. Neither the Pool Producer nor any media outlet will hold a copyright or any other intellectual property right for any of the raw footage from cameras or the single transmission feed that is produced that would prevent any other media outlet or entity from using, broadcasting, or sharing the footage or any other free use thereof. The Pool Producer shall also manage an audio, still photography, and video feed from the computers being used to publish exhibits to the jury, and may include such footage in its production of the single transmission feed. Finally, the Pool Producer will provide a “YouTube ready” version of the single transmission feed for the Minnesota Judicial Branch to use as it wishes.

6. Pan, tilt, and zoom (PTZ) functions of cameras may be used at the discretion of the Pool Producer, but with the following limitations:

- a. No juror or potential juror shall appear in any video at any time. Audio of potential jurors during jury selection will be allowed, except that no audio shall be allowed for any *in camera* examination of a juror pursuant to Minn. R. Crim. P. 26.02 subd. 4(4).
- b. No witness under the age of 18 shall appear in any video unless the witness and at least one parent or guardian of the witness consents in writing before the witness is called. Audio coverage shall be allowed regardless of whether video is allowed.
- c. No members of the George Floyd family shall appear in any video unless the witness consents in writing or orally on the record before the witness is sworn. Audio coverage shall be allowed regardless of whether video is allowed.

- d. With the exception of when a verdict is taken, no video of counsel tables, including video of counsel for the State, the defendants, or defense counsel, shall be allowed unless all tables, counsel and parties are visible in the image (*i.e.*, no zooming in on any one table of participants).
 - e. The camera on or near the bench cannot be positioned or manipulated to view anything on the horizontal surface of either the bench or witness stand.
 - f. Camera PTZ functions shall be performed remotely and as quietly as possible so as to be imperceptible to trial participants.
7. The Pool Producer shall have a technician present in the courtroom during trial to troubleshoot and to facilitate communication between the Court and the Pool Producer.
8. No microphones will be placed at any counsel table and no audio coverage of conversations occurring at counsel tables shall be allowed.
9. Within two weeks of the conclusion of trial, the Pool Producer will provide to the Fourth Judicial District Administrator four copies of the single transmission feed. The District Administrator will file a copy of the single transmission feed as a court exhibit in each of the four cases. The format of the copies should be in a format approved by the Court.
10. The attached memorandum is incorporated.

BY THE COURT:

Peter A. Cahill
Judge of District Court

Memorandum

The right to a public trial, guaranteed by both the Sixth Amendment of the United States Constitution and Art I, § 6 of the Minnesota Constitution, is for the benefit of the defendant, not the public. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 381 (1979); *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). This right ensures that:

the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions.”

Gannett Co., 443 U.S. at 380; *see also Estes v. Texas*, 381 U.S. 532, 538-39 (1965).

But concurrent with the defendant’s right to a public trial is the press and general public’s First Amendment right of access to public trials, recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980), *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605-06 (1982), and *Waller v. Georgia*, 407 U.S. 39, 44 (1984). The interests promoted by this First Amendment right of public access are similar to those promoted by the defendant’s Sixth Amendment right to a public trial:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Globe Newspaper, 457 U.S. at 606 (citations omitted).²

² *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) (emphasis in original; citations omitted):

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. . . . [The openness of criminal trials] has what is sometimes described as a “community therapeutic value.” . . . Criminal acts . . . often provoke public concern, even

The defendant's Sixth Amendment right to a public trial and the public and media's rights of access to criminal trials under the First Amendment are not unlimited. *Globe Newspaper*, 457 U.S. at 606; *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995). In the past, failures to restrict public and media access inside the courtrooms of high-profile trials resulted in media action that was so intrusive and disruptive that defendants' rights to a fair trial were violated.³ While the right of the press and public to attend criminal trials is sacrosanct, and carries with it the right to report what has occurred during the trial, the right does not include a right to "telecast" the actual proceedings. *Estes v. Texas*, 381 N.W.2d 532, 541-542 (1965).

Against this historical background, the Minnesota Supreme Court promulgated the current version of Minn. Gen. R. Prac. 4, which limits audio and visual media coverage of criminal proceedings. While that rule sets out a general rule of prohibition,⁴ it also allows for the visual and/or audio recording and reproduction of trial proceedings with the consent of all parties.⁵ Even with the consent of all parties, visual or audio recording of trial proceedings is limited.⁶ Normally, this rule can be applied without concern that it will impinge on the right to a public trial or the right of access held by the public and press. Spectators may freely attend trials, and the usual trial receives little attention, except from family and friends of the victim or

outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

³ See *Estes v. Texas*, 381 U.S. 532 (1965); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 548-549 (1980) (discussing trial in the Lindbergh baby kidnapping and murder).

⁴ Minn. Gen. R. Prac. 4.01.

⁵ Minn. Gen. R. Prac. 4.02(d). All Defendants have moved for audio and video broadcast of the trial. The State has objected.

⁶ Minn. Gen. R. Prac. 4.02(d)(i)-(v).

the defendant and the Court can easily accommodate those wishing to attend the trial in person. On occasion, members of the media attend and report on the proceedings. All spectators, whether journalists, interested parties, or casual observers, may, in normal times, come and go as they please.

The instant situation, however, not only is abnormal—it is in fact quite unique. The COVID-19 pandemic persists and requires social distancing, especially during jury trials. All four Defendants here have been joined for trial by separate order filed today in all four cases in which this Court has granted the State’s motion for trial joinder. The joint trial requires extra counsel tables, and thus a higher demand on the space within the courtroom. Even when this Court used the largest courtroom in the Fourth Judicial District⁷ for the joint motion hearing on September 11, 2020, only a handful of family and media representatives could fit into the courtroom given all the parties and counsel and the social distancing requirements in the courtroom necessitated by the COVID-19 pandemic and various orders issued by Chief Justice Gildea and the Judicial Council in the wake of the COVID-19 pandemic.⁸ Most family and media had to observe the proceedings through a closed-circuit feed to other courtrooms,⁹ and even then had trouble hearing all of the proceedings. The general public could only observe from a closed-circuit feed to a courtroom several blocks away in the Hennepin County Government Center. The closed-circuit feed was limited to a static wide-view of the courtroom

⁷ Courtroom 630 of the Hennepin County Family Justice Center.

⁸ See, e.g., <https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Statewide-JMRT-Recommendations-for-Jury-Trials.pdf>; <https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Order-5152020.pdf>; <https://mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Order-070720.pdf>.

⁹ Arguably, the use of these “overflow courtrooms” necessitates audio and video coverage of the proceedings that is not permitted by Minn. Gen. R. Prac. 4.02(d).

from a single camera above the jury box. This was a hearing that did not require space for jurors and it was still cramped.

A courtroom has been rebuilt in the Hennepin County Government Center, Courtroom 1856, for the upcoming joint trial in these cases. Spacing requirements mean there will be little, *if any*, room for any spectators in that courtroom during the trial.¹⁰ That includes not only family members and friends of George Floyd and the Defendants, but also members of the public and the press.

Not surprisingly, these cases continue to hold the interest of the press and the general public on an international scale. Virtually every filing by the parties in these cases is reported in the media, both locally and nationally. This Court's substantive orders also receive local and national news coverage. Protests demanding justice for George Floyd continue. It is expected that, even with some overflow courtrooms, the demand by family members, the public, and the press to attend the joint trial will outstrip the court's ability to provide meaningful access.

This Court concludes that the only way to vindicate the Defendants' constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media in accordance with the provisions of the attached order. As the U.S. Supreme Court observed in *Sheppard v.*

Maxwell, 384 U.S. 333, 350 (1966):

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

¹⁰ A non-traditional setting for the trial (high school auditorium, *etc.*) is not a feasible alternative because of the security concerns outlined in a separate Order for an anonymous jury, also being filed today.

The Court acknowledges that the attached order allows for greater audio and video coverage than that contemplated by Minn. Gen. R. Prac. 4.02(d), even if all parties had consented. It could be argued that the Court should simply follow the limitations of the rule to protect the constitutional rights of the Defendants, the public, and the press. The limitations of the rule are so extensive, however, that nothing would be known about the empaneled jurors, all witnesses could veto coverage of their testimony, and the public would be left with nothing but the arguments of counsel. That is hardly a basis for the public “to participate in and serve as a check upon the judicial process.”

The Court’s attached order seeks to accommodate the interests served by the current rule by expanding audio and video coverage only as necessary to vindicate the Defendants’ constitutional right to a public trial and the public’s and press rights of access to criminal trials in the unique circumstances currently prevailing in the COVID-19 pandemic and the intense public and media interest in these cases. By doing so, the Court is confident that “the public may see [that Defendants] [are] fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep [their] triers keenly alive to a sense of their responsibility and the importance of their functions.”

PAC