

CASE NO. CR 29-22-2805
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CLERK OF DISTRICT COURT
LATAH COUNTY
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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 NUMBER CR29-22-0002805

**MEMORANDUM ON CAMERAS
DURING HEARINGS**

COMES NOW, Bryan C. Kohberger, by and through their attorney, Jay Weston Logsdon, Chief Deputy Litigation, and hereby provides the follow Memorandum on the use of cameras during the hearings in this case.

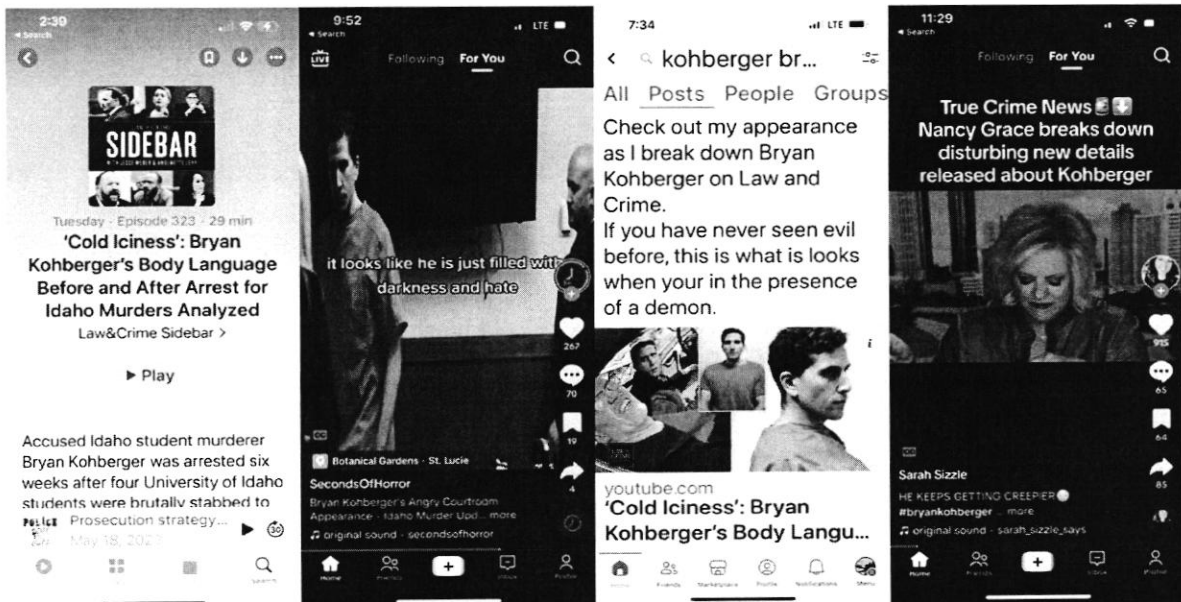
ISSUES

- I. This Court should limit Media coverage of this case to protect Sixth Amendment interests.
- II. This Court should not permit the Media to use cameras to permit unfairly prejudicial coverage of Mr. Kohberger or harass courtroom participants.

III. This Court should not permit cameras in the courtroom to distract courtroom participants from the real purpose we are here.

FACTS

Mr. Kohberger's charge and subsequent courtroom proceedings have captured the attention of local and national news organizations as well as social media platforms. The Court has previously permitted cameras in the courtroom in regards to this case's prior proceedings. However, given the sensationalized nature of the case, the audio/visual coverage has become material for news outlets and social media accounts to espouse their unfounded opinions. Following each of Mr. Kohberger's court appearances, numerous social media posts have been made regarding him through Facebook posts, YouTube and TikTok videos, and a podcast. Each video attempts to analyze Mr. Kohberger's demeanor by observing his body language from one court appearance and describing him using phrases such as "cold iciness," "It looks like he is just filled with darkness and hate," and "he keeps getting creepier" among numerous other phrases.



ARGUMENT

I. This Court should limit Media coverage of this case to protect Sixth Amendment interests.

While the media holds the crucial role of informing the public of criminal proceedings, the right only exists to the extent that it does not impede upon the rights of a defendant and is subject to maintaining fairness in the judicial process. A fundamental right of every defendant is the right to a fair trial by an impartial jury established by 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. XVI. The right to a public trial is not a right “belonging to the public but one belonging to the accused.” *Estes v. States of Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). As such, even though the public may have an interest in a particular case, “interest alone does not create a constitutional right.” See *Gannett Co., Inc. v. DePasquale*, 448 U.S. 368, 394 (1979) (Burger, C.J. concurring).

Furthermore, as the Court held in *Sheppard*, “given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.” *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Thus, the court has a duty to preserve a defendant’s right to a fair trial and must limit media exposure “when it is apparent that the accused might otherwise be prejudiced or disadvantaged.” *Id.* at 358.

To preserve a defendant’s right the court must balance the rights of a defendant and the interests of the media. In doing so, the court ought to recognize that a First Amendment claim

should not impinge upon the “most fundamental of all freedoms” – the right to a fair trial. *Estes*, 381 U.S. 532 at 540. Furthermore, while recognizing the importance of the media, the Court has held that the Sixth Amendment does not “require that the trial – or any part of it – be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).

II. This Court should not permit the Media to use cameras to permit unfairly prejudicial coverage of Mr. Kohberger or harass courtroom participants.

When cameras are present in the courtroom, the defendant becomes subject to minute scrutiny as his or her every movement can be replayed and analyzed. *See Estes*, 381 U.S. 532 at 563. As such, the court in *Vallow Daybell* held that video footage from a hearing displayed “an inordinate focus on the D, zooming onto her face, throughout the vast majority of the hearing, regardless of who was speaking or what was happening.” (Mem. Decision and Order Prohibiting Video and Photographic Coverage 4).

In the present case, Mr. Kohberger’s actions are heavily scrutinized as self-proclaimed “experts” utilize audio/visual footage from courtroom proceedings to make assumptions regarding his body language and character which actualizes prior courts’ concerns regarding the presence of cameras in the courtroom. For instance, a YouTube video titled “Psychologist Breaks Down Bryan Kohberger’s Arraignment Body Language” purports to “dissect every gesture, every shift in posture, every flicker of emotion that crossed Kohberger’s face during this tense courtroom scene” while utilizing only one courtroom video. Like *Vallow Daybell*, the purpose of the footage is to scrutinize Mr. Kohberger’s actions. In *Vallow Daybell*, the court determined that the footage during a hearing demonstrated “an inordinate focus on the Defendant” (4). Here, the court need not determine the

purpose of a video utilizing audio/visual recordings as the purpose of the commentator's purpose is explicitly clear. And such a video would not exist except for the presence of cameras in the courtroom. Furthermore, the video posted on May 23rd garnered over 44,000 views in two days further demonstrating the high level of interest in the case and the potential impact of pretrial publicity.

Additionally, an article published by the *New York Post* relied on audio/visual recordings to analyze Mr. Kohberger's body language. The article states that by "dissecting his most minute behaviors – from the use of his tongue to his controlled reactions and the tone of his voice – can paint a picture of his mindset." By doing so, the recordings are once again being utilized to scrutinize Mr. Kohberger as the "expert" reached an uncorroborated conclusion after viewing only one video. Stephanie Pagones, *Accused Idaho killer Bryan Kohberger's body language compared to Lee Harvey Oswald*, *New York Post* (May 23, 2023), <https://nypost.com/2023/05/23/accused-idaho-killer-bryan-kohbergers-body-language-akin-to-oswald-s/>.

Despite the apparent popularity of articles and videos claiming to explain body language, many such claims are not supported by scientific evidence as previous articles not cited by the self-appointed body language experts in videos concerning Mr. Kohberger explain. In fact, "studies have repeatedly shown that body language cannot accurately be 'read' like a book" Amelia Tait, *Body Language Pseudoscience Is Flourishing on YouTube*, *Wired* (Nov. 21, 2021), <https://www.wired.com/story/youtube-body-language/>. Vincent Denault, a postdoctoral fellow in psychology at McGill University, explains how "there is no innate universal 'language' of the body" and when self-appointed experts associate specific gestures or facial expressions with particular meanings, the statements "fall under the umbrella of pseudoscience." *Id.* Moreover, Denault describes how even keen observers cannot "infer a person's thoughts or intentions based on their nonverbal behavior alone" due to the lack of scientific support. Ramin Skibba/Undark, *The truth*

about reading body language. Popular Science (Oct. 8, 2020), <https://www.popsci.com/story/science/body-language-analysis/>. Thus, when articles and videos proclaim to reveal an individual's state of mind, they only contribute to an "ecosystem of misinformation" in which disparaging comments and dubious theories flourish. *Id.*

Along with making claims about Mr. Kohberger based on body language, social media videos also utilize the audio/visual footage from courtroom proceedings to make comments regarding Mr. Kohberger's character. The videos use phrases such as "cold iciness," and "If you have never seen evil before, this is what is [sic] looks when your [sic] in the presence of a demon." Similarly in *Irvin*, the Court held that clearly prejudicial statements included articles that "characterized petitioner as remorseless and without a conscience." *Irvin*, 366 U.S. 717 at 725. As the Court in *Nebraska Press Ass'n* noted, such characterizations may impact a jury's determinations as their ability "to decide the case fairly is influenced by the tone and extent of the publicity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). As such, these phrases are used to characterize and make determinations about an individual based on limited footage with no regard for the presumption of innocence which may impact a jury's opinion.

III. This Court should not permit cameras in the courtroom to distract courtroom participants from the real purpose we are here.

Once courtroom participants know they are being recorded, they may behave differently. The Court in *Estes* held that when a case is steeped in pretrial publicity "televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them." *Estes*, 381 U.S. 532 at 545. The Court further elaborated on how the presence of recording equipment may not be the distraction but more so the awareness of being recorded. *Id.* at 546. The Court even goes so far

as to say “not only will a juror’s eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than the testimony. *Id.*

Following similar reasoning, the court in *Vallow Daybell* also expressed concern regarding the additional pressure witnesses and counsel may be exposed to “knowing their every expression, utterance, and appearance will be captured and circulated without their control . . .” (Mem. Decision and Order Prohibiting Video and Photographic Coverage 6). The court also notes that the pressure placed on witnesses may unduly influence jurors as they may make an incorrect determination regarding the witness while he or she is under the additional pressure of being recorded. (Mem. Decision and Order Prohibiting Video and Photographic Coverage 6).

The presence of cameras also places additional responsibilities on the trial judge. Now not only must the judge preside over the proceedings, a task which requires his utmost attention, but also the media to ensure it complies with the rules governing courtroom conduct. See *Estes*, 381 U.S. 532 at 548. As such, the existence of cameras in the courtroom may potentially burden a judge as he might have his attention diverted “from the task at hand – the fair trial of the accused.” *Id.*

Additionally, the defendant may also be distracted by cameras. As the Court in *Estes* held,

The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance.


Estes, 381 U.S. 532 at 549. As a result, a defendant may not be able to fully focus on the proceedings despite being entitled to having his or her day in court. Therefore, the presence of cameras allows for the potential that the courtroom will devolve from a place for the victim, society, and the accused to receive justice to a mere spectacle.

CONCLUSION

The courtroom has a duty to preserve a defendant's right to a fair trial and ought to mitigate the prejudicial effects of trial publicity by exercising discretion to exclude video recordings from the courtroom. Thus, the court should exclude cameras from future courtroom proceedings to protect the integrity of the judicial process.

DATED this 6 day of June, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY: 

JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 6 day of June, 2023 addressed to:

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