

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER GOLUBSKI,

Defendant.

Case No. 22-40055-TC

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE TO
REQUEST VIDEO AND AUDIO STREAMING OF TRIAL PROCEEDINGS**

Dated: November 21, 2024

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PRELIMINARY STATEMENT

The Kansas City Star and Scripps Media, Inc., d/b/a KSHB-TV (“Movants”) have respectfully submitted a Motion to Intervene (the “Motion”), requesting leave to be heard on certain aspects of the Court’s Decorum Order of November 19, 2024 (the “Order”)¹. Specifically, the Movants request leave to be heard on the Order’s prohibition of the photography, recording, and broadcasting of these proceedings, and to affirmatively request that the Court permit the telecast of the trial. The allegations in this critically important matter, which affect not only the greater Kansas City, KS (“KCK”) community, but the public at large, demand public access. Forcing the citizens of the KCK community and elsewhere to travel to Topeka creates an undue burden to exercise their rights to observe and participate. While Rule 53 of the Federal Rules of Criminal Procedure generally bans the “broadcasting” of a trial from the Courtroom, in this matter a livestream of the trial is already set to be broadcast from the Courtroom to an overflow room in the Topeka Courthouse to permit observers to view the trial with the expectation that the main Courtroom will reach maximum capacity.² The Movants respectfully argue that offering public access through broadcasting from the overflow room, providing a link to the livestream from the overflow room to view the proceedings remotely, or permitting the streaming of the proceeding on the Court’s YouTube Channel from the overflow room, would not violate Rule 53 or Local Rule 83.2.1 and would be entirely consistent with First Amendment rights of the citizens of KCK.

¹ Decorum Order, ECF No. 154.

² *Id.* at p. 2.

“What transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). Recognizing this fundamental principle, the Supreme Court has repeatedly reaffirmed the need for the public and press to have meaningful access to criminal trials as the transparency of criminal trials “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Meaningful access to a criminal trial requires the public to be able to effectively participate in the criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980). Restrictions that operate to withhold meaningful access encroach on the right of access under the First Amendment. *United States v. Mendoza*, 698 F.3d 1303, 1307 (10th Cir. 2012). The right of access to view criminal proceedings is vital to the long-held tradition of allowing the public to witness for themselves the administration of justice. *Richmond Newspapers*, 448 U.S. 555 at 571-72. The live viewing of a trial fosters trust in and transparency of the judicial system. *Id.*

In this matter, the “public” at issue are the members of the KCK community who fell victim to Defendant’s alleged crimes, as well as others who have the greatest interest in ensuring there is effective administration of justice. The community victimized by the Defendant’s conduct is one in which it is difficult to gauge the availability of resources to travel to Topeka and ability to exercise their right to participate in the proceedings in person. A citizen of KCK will be required to travel over 120 miles each day to and from Topeka to hear evidence about the Defendant’s decades-long crimes which are all alleged to have occurred in KCK. The trial is scheduled to last 17 non-consecutive days, making daily attendance at the trial in Topeka that much more burdensome for the citizens most directly affected by the Defendant’s alleged crime.

At this point, there is no assurance about the availability of public transportation to the Topeka Courthouse and no ability to gauge the resources of the citizens who may wish to participate in the trial. It is a violation of the First Amendment to require the members of the public, who have the most consequential interest in this matter, to bear the expense to travel to participate in person and thus effectively exercise their First Amendment rights. An overflow courtroom in Topeka will do nothing to help these citizens exercise their First Amendment right to observe the trial. The Court's blanket application of the *per se* ban will effectively deny such individuals of their right to view Defendant's trial.

The ban in Fed. R. Crim. P. 53 and Local Rule 83.2.1 on the live broadcasting of a criminal trial from *inside of the Courtroom*, should not be permitted to encroach on the right of meaningful access to the proceedings under the First Amendment. Indeed, the Rules permit the Court to broadcast the proceedings from the Courtroom to an overflow room, as often in high profile matters the main courtroom quickly reaches maximum capacity, and as recognized by the Court in its Order. It necessarily follows then that the Court would not be violating Rule 53 if the broadcast of the proceedings came from the overflow room as that room is not the "Courtroom" contemplated by the Rules. Thus, under the circumstances of this case and the advancement of technology, the Court should allow for increased access of the real-time viewing of Defendant's criminal trial via Zoom broadcasting from the overflow room, the Court's YouTube channel or other such mechanism.

FACTUAL BACKGROUND

On September 14, 2022, Defendant Roger Golubski was indicted on six counts of deprivation of civil rights in violation of 18 U.S.C. § 242.³ Defendant stands accused of an atrocious list of sexual crimes perpetrated against vulnerable young women during his long tenure as a law enforcement officer with the KCK Police Department.⁴ Over the course of several years, Defendant allegedly committed the crimes of aggravated sexual assault, kidnapping, attempt to commit aggravated sexual assault and attempted kidnapping, all while acting under the color of law, and all against residents of KCK, more than sixty miles from Topeka, the site chosen by the Court for the upcoming trial.⁵

The allegations in this matter, while serious on their own, constitute only a small fraction of the crimes alleged to have been committed by Defendant against the vulnerable citizens of KCK. Indeed, Defendant has also been indicted in a companion case, charged with allegedly conspiring with others “to hold young women in a condition of involuntary sexual servitude”⁶ during which Defendant allegedly inflicted sexual and physical abuse against his victims, typically young Black girls between the age of 13 to 17.⁷ In his role as a police

³ Sealed Indictment, ECF No. 1; Superseding Indictment, ECF No. 73.

⁴ *Id.*

⁵ While the Government requested for the trial to be in Topeka, the Court had discretion to try the case at the Courthouse in Kansas City, KS. *See* Local Rule 40.2 (“The court is not bound by the requests for place of trial. It may determine the place of trial upon motion or in its discretion”); FRCP Rule 18 (“Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.”).

⁶ *See* Press Release, Office of Public Affairs, U.S. Department of Justice, *Former Kansas City, Kansas, Police Department Detective and Three Others Indicted for Conspiracy to Hold Young Women in Involuntary Servitude and Forcing Them to Provide Sexual Services* (Nov. 14, 2022), <https://www.justice.gov/opa/pr/former-kansas-city-kansas-police-department-detective-and-three-others-indicted-conspiracy>.

⁷ Sealed Indictment, *United States v. Brooks et al.*, No. 5:22-cr-40086-TC (10th Cir. Nov. 10, 2022), ECF No. 1.

detective, Defendant allegedly provided his co-conspirators protection from law enforcement investigation and intervention in exchange for money.⁸ Defendant is alleged to have hunted and preyed on the most vulnerable citizens of KCK, and used his position in law enforcement to shield himself from detection and challenge, effectively imposing a reign of terror on the Black citizens of the KCK community for years.⁹

The criminal trial for this proceeding is set to begin on December 2, 2024, in Topeka.¹⁰ As discussed, Topeka is approximately sixty miles from KCK, where Defendant is alleged to have committed his crimes. Defendant's alleged victims, known and unknown, throughout the greater KCK area, have the greatest (but not the sole) interest in participating in and witnessing the prosecution of Defendant. The added distance to travel from KCK to Topeka is a barrier and restriction on KCK residents who are deterred from obtaining access to the Court due to the time and costs for travel and/or lodging.

The interest in participating in and witnessing the trial is greatest for those who live in the areas in which Defendant allegedly engaged in his predatory behavior. After years of losing faith and trust in the KCK Police Department and witnessing the chilling consequences of a failure of justice in law enforcement and in the judicial system,¹¹ the KCK community is entitled to and deserves the ability to participate in and witness the administration of justice in this matter in real time. And this case – involving horrifying allegations of police brutality – reaches beyond the KCK community. The right to access, participate and observe Defendant's

⁸ *Id.* at p. 2.

⁹ *Id.*; Peggy Lowe, *Deeper than Golubski: A culture of corruption defined the Kansas City, Kansas Police Department*, KCUR, Nov. 23, 2022, <https://www.kcur.org/news/2022-11-23/deeper-than-golubski-a-culture-of-corruption-defined-the-kansas-city-kansas-police-department>.

¹⁰ Trial Order, ECF No. 89.

¹¹ Complaint, *Hobbs. v. Unified Government of Wyandotte County and Kansas City, Kansas et al.*, No. 2:24-cv-02422 (10th Cir. Sept. 13, 2024), ECF No. 1; Lowe, *supra* note 7.

trial is guaranteed by the First Amendment and outweighs the outdated policy concerns behind the ban on broadcasting criminal trials in federal court. This Court has the discretion to allow the citizens of KCK and beyond to witness the administration of justice in this case by allowing a livestream from the overflow room on Zoom or on the Court's YouTube channel.

In light of the allegations in this case, where an officer sworn to protect then used his position to terrorize them, the citizens of KCK deserve to know that the law enforcement system can protect them.

ARGUMENT

I. MOVANTS' MOTION TO INTERVENE SHOULD BE GRANTED

While the Federal Rules of Criminal Procedure do not provide a procedure for third-party intervention in criminal proceedings, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (internal quotation marks omitted). Courts have permitted the press to intervene in criminal cases where First Amendment rights are implicated. *See e.g., United States v. Kaufman*, Nos. 04-40141-01, 02, 2005 U.S. Dist. LEXIS 23825 (D. Kan. Oct. 17, 2005) (granting motion to intervene in criminal proceedings to oppose the exclusion of sketch artists); *United States v. Hernandez*, 124 F. Supp. 2d 698 (S.D. Fla. 2000) (granting motion to intervene where First Amendment right to access court records in criminal trial was at issue). Other federal courts allow for the press to intervene in criminal cases through a motion to intervene. *See e.g., In re Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986) ("[t]he press has standing to intervene in actions to which it is otherwise not a party in order to petition for access to court proceedings and records"); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 580 (S.D.N.Y. 2009) ("A motion

to intervene to assert the public's First Amendment right of access to criminal proceedings is proper."); *In re Storer Commc'ns, Inc.*, 828 F.2d 330, 335 (6th Cir. 1987) ("media organizations may move to intervene for the purpose of contesting closure of hearings and the sealing of documents.").

Further, Kansas law is also persuasive on the matter. The Kansas Supreme Court has established the media's right to intervene in a criminal proceeding for limited purposes. *See Wichita Eagle Beacon Co. v. Owens*, 27 P.3d 881, 883 (Kan. 2001) (ruling that "the news media, as a member of the public, should be permitted to intervene in a criminal case for the limited purpose of challenging a pretrial request, or order, to seal a record or close a proceeding in that case, even without an express statutory provision allowing such intervention").

Thus, as the First Amendment rights of the press and public are implicated by the limitations on access to this case, Movants' motion to intervene should be granted.

II. THE PRESS AND CITIZENS OF KANSAS CITY, KS AND BEYOND HAVE A CONSTITUTIONAL RIGHT OF MEANINGFUL ACCESS TO DEFENDANT'S CRIMINAL TRIAL PROCEEDINGS

There is no dispute that the right of the public and press to attend criminal trials "is implicit in the guarantees of the First Amendment." *Richmond Newspapers*, 448 U.S. at 580 (ruling that "without the freedom to attend [criminal] trials...important aspects of freedom of speech and 'of the press could be eviscerated.'"). This fundamental constitutional right is essential to the appearance and administration of justice and in ensuring public confidence in our judicial system. *Id.* at 572. As such, the administration of justice cannot be done in the dark because "no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571.

The right of access to criminal trials is essential in permitting communities to participate in the judicial process and “enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.” *Globe Newspaper Co.*, 457 U.S. at 606 (ruling that Massachusetts’ mandatory closure rule denying access to criminal trial violated the First Amendment). The Supreme Court emphasized that the First Amendment is broad enough “to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.” *Id.* at 604. Access must be meaningful. *See Mendoza*, 698 F.3d at 1307 (recognizing the “various interests of the public and the press” to have **meaningful access** to criminal proceedings. (citing *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993))).

The citizens of KCK (and beyond) have an undisputed First Amendment right to attend Defendant’s criminal trial. After years of Defendant’s alleged abuse of power in law enforcement and terrorizing of the Black citizens of KCK, there is yearning for justice to be served — not only by the public at large, but by the very community that fell victim to Defendant’s abuse. In this instance, the location of Defendant’s trial in Topeka diminishes the right of access that is guaranteed to the people of KCK under the First Amendment. The requirement to travel to Topeka to take full advantage of the guarantees of the First Amendment operates to keep those who are unable to afford the time and/or expense to travel out of this Courtroom. Consequently, access to the Court is essentially foreclosed without proper justification. *See Globe Newspaper*, 457 U.S. at 606 (“[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one.”); *Press-Enterprise Co.*, 464 U.S. at

510 (“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”).

Moreover, this barrier to access strips the citizens of KCK of the benefits underlying the First Amendment. As the Supreme Court has noted, “[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.” *Richmond Newspaper*, 448 U.S. at 571. Members of the KCK community are unable to witness the real time administration of justice that will provide therapeutic value after years of Defendant’s claimed abuses in their community.

Rather, they are forced to rely on second-hand interpretations of the proceedings relayed from notes taken by those who are in a position to attend the trial. *See ABC, Inc. v. Stewart*, 360 F.3d 90, 99-100 (2d Cir. 2004) (“The ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access Where a right of access exists, a court may not deny access to a live proceeding solely on the grounds that a transcript may later be made available. Such a transcript would not fully implement the right of access because some information, concerning demeanor, non-verbal responses...is necessarily lost in the translation of a live proceeding to a cold transcript.”). Transcripts and news accounts are insufficient for timely access under the First Amendment. *See Courthouse News Serv. v. N.M. Admin. Office of the Courts*, 53 F.4th 1245 (10th Cir. 2022) (“If a First Amendment right of access exists, it carries an associated ‘right to timely access.’”). While not unambiguously enumerated in the First Amendment, the granting of virtual access to Defendant’s criminal

trial is nonetheless necessary to the enjoyment of the undisputed right of access to criminal trials in this instance, and thus falls appropriately under the broad latitude of the First Amendment. *See Globe Newspaper Co*, 457 U.S. at 604. The Court is thus obligated “to take every reasonable measure to accommodate public attendance at criminal trials,” *Presley v. Georgia*, 558 U.S. 209, 215 (2010), including granting access to the public by allowing broadcasting from the overflow room via Zoom or YouTube.

III. REMOTE ATTENDANCE COMPORTS WITH MEANINGFUL AND REASONABLE ACCESS GUARANTEED BY THE FIRST AMENDMENT

Attendance of the public at criminal trials is deeply rooted in our justice system. *Richmond Newspapers*, 448 U.S. at 564-67 (“throughout its evolution, the trial has been open to all who cared to observe.”). A public trial gives assurance of the fairness of the trial and discourages perjury, misconduct, and bias or partial decisions. *Id.* at 569. Further, “[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” *Id.* at 572 (1980).

Today, the logic and purpose that supported the need for the public and press to have access to courts is advanced by today’s technological advancements. The limits of physical presence and the capacity of a courtroom are redressed by allowing the public to gain virtual access to the courtroom to watch trials remotely. Audiovisual access in this proceeding will not only further the deeply rooted history of access to trials, but promote the administration of justice and advance the appearance of social justice. Moreover, there is sufficient proof from

State proceedings that audiovisual access is not only functional but essential in criminal cases of great public concern.

For example, the Minnesota court in the prosecution of former police officer Derek Chauvin permitted cameras in the courtroom to record and provide real-time access to his trial.¹² Similar to this criminal proceeding, Chauvin was on trial for crimes committed while acting under the color of law as a police officer, specifically, the May 2020 murder of George Floyd that sparked national outrage and ignited calls for social justice against police brutality of Black citizens. While audio and visual recordings of trials were typically prohibited in Minnesota, the court nonetheless concluded that “[i]t 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 . . . 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.” *See Order Allowing Audio and Visual Coverage of Trial, Minnesota v. Chauvin*, 27-CR-20-12646 (Minn. Nov. 4, 2020) (“Minnesota Order”).¹³ As such, the Minnesota court acknowledged the constitutional requirement for meaningful access to the criminal trial and ensured that access was appropriately inclusive, and ordered the audio and video coverage of the trial, including broadcasting by the media. *Id.* at 8. Here too, audiovisual access to Defendant’s trial will effectively protect the interests of Defendant’s Sixth Amendment right to a public trial and the First Amendment right of the public and press to view the trial by providing meaningful and

¹² Jon Collins, *News Outlet Push for Livestream of Trial in Floyd Case*, MPRNEWS, Dec. 15, 2020, <https://www.mprnews.org/story/2020/12/15/news-outlets-push-for-livestream-of-trial-in-floyd-case>.

¹³ A true and correct copy of the Minnesota Order has been attached hereto as **Exhibit A**.

reasonable access to the courtroom. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (“the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”).

Further, the current precedent governing the public right to attend criminal trials is outdated and does not align with today’s technological advancement or calls for greater transparency in government affairs and public administration of justice. Precedent supporting the restrictions on audiovisual access to criminal trials rests on the technological limitations and concerns of the time in which those decisions were made. *See Estes v. Texas*, 381 U.S. 532, 604 (1965) (where 12 cameramen in the courtroom caused “considerable disruption of the hearings” due to mass wires, television cameras, microphones, and photographers). These concerns of the disruption of having cameras in the courtroom are quelled by modern technology that allows for audiovisual access without such disruption. Even in 1981, the Supreme Court recognized that “many of the negative factors found in *Estes* -- cumbersome equipment, cables, distracting light, numerous camera technicians -- are less substantial factors today than they were at that time.” *Chandler v. Florida*, 449 U.S. 560, 576 (1981). Capturing the same visual and audio in 1965 can be accomplished today with less equipment and disruption. Even more, the ability to gain access to a courtroom through applications such as Zoom and YouTube live broadcasting, further diminishes concerns about the disruption of in-person audiovisual setups. Indeed, the Court already has set up “live streaming” from the courtroom to an annex to accompany overflow crowds, and thus extending the broadcasting to Zoom or YouTube should pose no technological burden. From the point of view of potential courtroom disruption, the movants’ proposal would occasion no increase in potential disruption that the Court has already found acceptable.

Nor are the other concerns of live broadcasting in *Estes* applicable in this proceeding. The court in *Estes* raised concerns of the impact televising proceedings may have on a criminal trial, particularly on jurors and witnesses. *See generally Estes*, 381 U.S. at 545-48. The Court still has the power to limit the recording of jurors and witnesses if necessary. Any rules of confidentiality that already apply to this proceeding can be extended to limit what is recorded and shared.

Further, as the Supreme Court noted in *Chandler v. Fla.*, *Estes* does not stand for the proposition that the recording of criminal trials is unconstitutional. 449 U.S. 560, 582-83 (1981) (holding that “the Constitution does not prohibit a state from experimenting” with a program regulating radio, television, and other photographic coverage of court proceedings.”). Since *Estes* the State courts have been a testing ground for the success of audiovisual access to criminal proceedings. Today, only two states still prohibit all audiovisual webcasting.¹⁴ More recently, the Supreme Court rejected “expressing any view on whether [federal] trials should be broadcast[ed]” as the subject has prompted considerable national debate and “[r]easonable minds differ on the proper resolution.” *Hollingsworth v. Perry*, 558 U.S. 183, 184, 189 (2010) (ruling that the district court’s failure to follow procedural rules to update local judicial rules to allow for broadcasting of trial rendered the rule ineffective). The need for precedent in federal law that reflects today’s virtually accessible world compels a re-assessment of the restrictions on the broadcasting of federal criminal trials. At minimum, in this instance Movants’ requested relief is sufficiently narrow to allow the Court to use its

¹⁴ Cameras in the Courts, A State-By State Coverage Guide, RTDNA, <https://courts.rtdna.org/cameras-overview.php> (last visited Nov. 15, 2024).

discretion in providing reasonable meaningful access to Defendant's trial to the KCK community and beyond.

IV. THE COURT'S EXERCISE OF DISCRETION TO ALLOW MEANINGFUL AND REASONABLE ACCESS UNDER THE FIRST AMENDMENT IS APPROPRIATE HERE

In this case, the limited access to the courtroom in Topeka and the courtroom's distance from the locus of the alleged crimes encroach on the First Amendment rights of the people of KCK and others. As established, the press and the public have a constitutional right of access to watch Defendant's trial. This access must be timely and meaningful. Defendant's trial is approximately sixty miles from KCK where defendant is alleged to have committed his crimes. This distance operates to exclude those members of the KCK community who are unable to afford the time or costs to commute the distance to witness Defendant's trial in real time. The mechanical application of Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.2.1 in the Order will further strip these individuals from access to the courts in an instance where the administration of justice is most important. In this instance, Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.2.1 violate the implicit guarantees of meaningful access to the courts under the First Amendment.

Rule 53 restricts the taking of photographs of judicial proceedings and the broadcasting of judicial proceedings "from the courtroom" unless "otherwise provided by a statute or these rules." Fed. R. Crim. P. 53. Rule 53 is not a *per se* ban on the recording of all proceedings. Rather, Rule 53 is limited to restricting live broadcasting from within the physical courtroom in which a trial is taking place. Rule 53 does not, on its face, limit how a criminal trial is

broadcasted when the broadcasting is not within the physical courtroom of the trial. Consequently, the Court has discretion to allow broadcasting from the overflow room in the courthouse. An overflow room is not a “courtroom” as contemplated by Rule 53. There are no active proceedings in an overflow room. There are no jurors or witnesses actively present. Nor is there a presiding judge or defendant. Further, there are no distractions or disruptions that can be caused by the use of cameras. The concerns that support the rationale behind Rule 53’s prohibition on broadcasting *from the courtroom* are not applicable to broadcasting from the overflow room. Further, while other circuits with outdated precedent have found that Rule 53 does not violate the First Amendment, possible violations of the First Amendment must be considered on a case-by-case basis.

Similarly, Local Rule 83.2.1 of the United States District Court of Kansas prohibits the following: “(1) radio or television broadcasting; and (2) the use of reproduction or recording equipment that is (a) photographic, (b) electronic, or (c) mechanical.” Local Rule 83.2.1 allows for the Court to grant permission for the photographing or broadcasting from the courtroom of certain ceremonial proceedings. *Id.* Local Rule 83.2.1 is a blanket prohibition that violates the First Amendment right of the press and public to have access to the court. When applied to this proceeding, such a prohibition is unconstitutional as it fails to make a particularized determination in this individual case. *See Globe Newspaper*, 457 U.S. at 611 n.27 (“a mandatory rule [of exclusion], requiring no particularized determinations in individual cases, is unconstitutional.”). Moreover, there is no overriding interest based on any findings that such a blanket ban preserves values higher than the First Amendment issues at hand, or that the ban is narrowly tailored to serve such interests. *See Press-Enterprise Co.*, 464 U.S. at 510 (“The presumption of openness may be overcome only by an overriding interest based on

findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”). As this Motion does not request broadcasting from the physical courtroom in which the Defendant’s trial will take place, but rather broadcasting from the overflow room, there will be no concerns about disruptive technology in the courtroom.

Thus, neither Rule 53 nor Local Rule 83.2.1 prohibits the relief which Movants requests and the Court has discretion to allow broadcasting from the overflow room to ensure that there is meaningful and timely access to Defendant’s criminal trial by the citizens of KCK as protected by the First Amendment.

V. ALTERNATIVELY, THE COURT SHOULD EXPAND AVAILABILITY OF THE LIVE LINK FOR THE OVERFLOW AND MEDIA ROOM AND TO THE COURTHOUSE IN KANSAS CITY, KS

Even if the Court rejects Movants’ request for broadcasting from the overflow room, there is nothing in Rule 53 or Local Rule 83.2.1 that prohibits the Court from sharing the link of Defendant’s trial to the press and public, or allowing the Defendant’s trial to also be streamed to Zoom or YouTube alongside the streaming to the overflow room, or providing an audio “listen only” dial in option. To grant this alternative relief, the Court will not be “permit[ting] the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” FRCP 53. Nor will there be any broadcasting or use of reproduction or recording equipment of any kind in the courthouse in violation of Local Rule 83.2.1. Sharing of the link, that will already be active to the overflow and media room, is thus not prohibited. Lastly, as a third alternative, the Court should allow Defendant’s trial to be streamed to an overflow room in the Kansas City Courthouse, similar to the streaming to the overflow room in the Topeka Courthouse, to increase access for the KCK community. This Court already has

the equipment and ability to broadcast Defendant's trial so there is no added burden in granting this alternative relief. When considering the great interest in the ability for the victims and citizens of KCK to watch Defendant's trial in real time pursuant to the goals of the Frist Amendment, the Court should grant this Motion.

VI. CONCLUSION

Thus, the Court should grant Movants' Motion to intervene to request leave to be heard regarding the Order and request leave of the Court to permit the telecast of the entirety of the December 2024 criminal trial in this proceeding.

Dated: November 21, 2024

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served this 21st day of November, 2024, by electronic means, on counsel of record in this matter.

/Mark P. Johnson/

Mark P. Johnson

EXHIBIT A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

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

vs.

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

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

Defendants.

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