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CIRCUIT COURT
DANE COUNTY, WI
2020CF000886

BY THE COURT:

DATE SIGNED: May 11, 2022

Electronically signed by Ellen K. Berz
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 11

STATE OF WISCONSIN,
Plaintiff,

v. **Case No. 20CF886**

KHARI O. SANFORD,
Defendant.

DECISION AND ORDER
AUDIO/VIDEO RECORDINGS

Both State of Wisconsin ("Plaintiff") and Khari Sanford ("Defendant") joined in a motion asking this Court to forbid livestreaming or rebroadcasting of the upcoming proceedings, including the jury trial. Media Coalition ("MC"), representing three media outlets – WKOW, WISC, and WMTV as well as the Radio Television Digital News Association, Wisconsin Broadcasters Association, and Wisconsin Freedom of Information Council -- opposes the motion.

MC requested a hearing but failed to provide any explanation of how a hearing would be helpful to the determination of this issue. As it is without any good cause shown, MC's request for a hearing is DENIED.

Throughout MC's entire brief, it confuses the issue of media access to closed hearings, with a trial court's discretion to decide the time, place, and manner of media coverage inside of a courtroom. Although MC correctly cites to *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982) and *In re Associated Press v. Ladd*, 162 F.3d 503 (7th Cir. 1998) for the proposition that media who have been denied access into a closed court proceeding have standing to be heard as to that denial, access has never been denied in this case, is not contemplated, and is not the issue at bar.

Notwithstanding the failure to provide any legal authority for intervention regarding discretionary decisions on time, place, and manner of media coverage, this Court allowed Plaintiff, Defendant, and MC to be heard by brief on the issue. However, as only WKOW and WISC filed requests to bring cameras into the courtroom, only those two entities are granted permission to provide input on the matter of time, place, and manner of audio/video coverage in the courtroom.

Discretionary decisions, such as the one at bar, must be reasonably based on facts and law:

> [Discretionary decisions] must be the product of a rational mental process by which the facts of the record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.

State ex rel. Newspapers, Inc. v. Cir. Ct. for Milwaukee Cnty., 124 Wis. 2d 499, 509, 370 N.W.2d 209, 214 (1985) (*citing Jasper v. Jasper,* 107 Wis.2d 59, 64, 318 N.W.2d 792, 795 (1982)).

> [In reviewing discretionary decisions, the question is] whether under the facts and with the application of the correct legal standards, a reasonable trial judge could have reached a particular conclusion.

Newspapers, Inc., 124 Wis. 2d at 509, 370 N.W.2d at 214 (*citing McCleary v. State,* 49 Wis.2d 263, 182 N.W.2d 512 (1971)).

> An appellate court will not find an abuse of discretion unless it is evident that there was no rational basis for the trial court's decision, that is, a reasonable judicial mind in light of the law and the facts could not have reached the conclusion it did.

Newspapers, Inc., 124 Wis. 2d at 509, 370 N.W.2d at 214 (*citing Wisconsin Public Service Corp. v. Krist,* 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981)).

Based upon all of the facts, law, and concerns discussed in this Decision, and incorporating the submissions by Plaintiff and Defendant[1], the motion by Plaintiff and Defendant is GRANTED.

I. FACTS

This case involves a highly publicized, sensational homicide of a husband and wife in the very popular Arboretum grounds in Madison on or about March 30, 2020. Defendant was arrested on April 2, 2020 and had his initial appearance on April 7, 2020. On March 28, 2022, approximately two years later and less than two weeks prior to an upcoming hearing, one media outlet – WKOW – requested permission to have a camera in the courtroom and to livestream the motion hearing scheduled on April 7, 2022. Court Document 153. Two days later, media outlet WISC requested permission to have a camera in the courtroom. Court Document 157. WMTV, Radio Television Digital News Association, Wisconsin Broadcasters Association, and Wisconsin Freedom of Information Council have never requested permission to have a camera in the courtroom for this case. *See* Court Record.

[1] WI SCR 20:33 requires attorneys to provide truthful information to the court to enable the court to make an informed decision.

After notifying the parties (Plaintiff and Defendant) of the media requests pursuant to Dane County Circuit Court Local Rule 101, this Court granted the requests of WKOW and WISC to have cameras in the courtroom under certain court-imposed rules but did not allow livestreaming of the April 7, 2022 motion hearing. Court Documents 161, 162.[2]

At the April 7, 2022 motion hearing, this Court granted the parties and MC an opportunity to be heard, by brief, on the issue of what audio/video limitations, if any, are appropriate for media in the courtroom during upcoming proceedings, most importantly the May 16, 2022 jury selection and succeeding jury trial.

Based upon MC's erroneous recitation of facts as well as its misapplication and conflation of well-settled law, this Court will address at length the federal rules, Dane County Circuit Court rules, Wisconsin Supreme Court rules, applicable statutes, constitutional provisions, case law, case facts and relevant case concerns.

II. FEDERAL COURTS

In considering the issue of audio/visual recording of trials, it is informative to review the rules, and their genesis, promulgated by federal courts.

Over the decades, some high-profile cases were extensively covered by news media. As recognized by the U.S. Supreme Court:

> [That extensive coverage] was sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice.

Chandler v. Florida, 449 U.S. 560, 563, 101 S. Ct. 802, 803, 66 L.Ed2d 740 (1981).

[2] "Law & Crime Network" filed a similar request for a camera in the courtroom (Court Document 156) and was provided the same court response (Court Document 163). It did not file any opposition or request to be heard.

After the nation's legal community became concerned, the American Bar Association House of Delegates studied the issue and adopted Judicial Canon 35 which held that all photographic and broadcast coverage of courtroom proceedings should be prohibited. *Id.* at 562-563, 101 S. Ct. at 803. That canon was amended in 1952, and reaffirmed in 1972 under the new Code of Judicial Conduct Canon 3A(7), to further prohibit television coverage. *Id.* at 563, 101 S. Ct. at 804. A 1978 effort to revise the rule to allow for electronic media coverage as deemed appropriate by the trial judge was rejected by the House of Delegates.

> In 1996, the Judicial Conference of the United States adopted a policy opposing the public broadcast of court proceedings. This policy was adopted after a multiyear study of the issue by the Federal Judicial Center which drew on data from six district and two appellate courts, as well as state-court data. In light of the study's findings, the Judicial Conference concluded that "the intimidating effect of cameras on some witnesses and jurors [is] cause for concern." Administrative Office of United States Courts, Report of Proceedings of Judicial Conference of the United States 47 (Sept. 20, 1994

Hollingsworth v. Perry, 558 U.S. 183, 193, 130 S. Ct. 705, 711–12, 175 L. Ed. 2d 657 (2010).

In 1944, Rule 53 of the Federal Rules of Criminal Procedure was adopted. It was stylistically amended in 2002 to its current form:

> Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

This rule, generally prohibiting all electronic recording or broadcasting of proceedings in federal courts, neither violates the media's First Amendment right to freedom of the press nor the defendant's Sixth Amendment right to a public trial. *Hastings*, 695 F.2d at 1284.[3]

[3] This decision will not elaborate on this Defendant's Sixth Amendment right to a public trial because he is not raising the issue. To the contrary, Defendant and Plaintiff both urge this Court to prohibit live broadcasting of the trial.

III. DANE COUNTY CIRCUIT COURT RULES

The Dane County Circuit Courts have adopted rules governing many areas of judicial management. Dane County Circuit Court Rule 101 discusses the requirements on the media for providing notice if they wish to bring cameras or recording equipment into a courtroom. There are no rules which in any way limit the authority and responsibility of the trial judge to control the time, place, and manner of media coverage of any proceeding before the trial judge.

IV. WISCONSIN SUPREME COURT RULES

In 1978, the Conference of State Chief Justices approved a resolution to allow the highest court in each state to promulgate rules regulating the media's coverage of court proceedings. *Chandler*, 449 U.S. at 564, 101 S. Ct. at 804.

In 1979, the Wisconsin Supreme Court promulgated Chapter 61 of the Supreme Court Rules governing electronic media and still photography coverage of judicial proceedings. The chapter contains a number of provisions regulating the time, place, and manner of media activity in the courtroom, all of which are in effect *unless* otherwise provided by the trial judge:

> These rules of conduct in this chapter do not limit or restrict the power, authority or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by this chapter.

WI SCR 61.01(1).

V. VICTIM AND WITNESS RIGHTS

In Wisconsin, victims and witnesses have rights that are guaranteed by statute and state constitution.

Wis. Stat. § 950.04(1v)(ag) provides victims with the right "[t]o be treated with fairness, dignity, and respect for his or her privacy . . . ."

Wis. Stat. § 950.04(2w)(c) provides witnesses with the right "[t]o receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts . . . ."

April 7, 2020 was the effective date for the state constitutional amendment relating to victims' rights. Article 1, § 9m of the Wisconsin constitution now guarantees:

> (1) (a) In this section, notwithstanding any statutory right, privilege, or protection, "victim" means any of the following:
>
> . . .
>
> 2. If the person under subd. 1. is deceased or is physically or emotionally unable to exercise his or her rights under this section, the person's spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative.
>
> . . .
>
> (2) In order to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process, victims shall be entitled to all of the following rights, which shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused:
>
> (a) To be treated with dignity, respect, courtesy, sensitivity, and fairness.
>
> . . .

As such, the legal rights of victims and witnesses must be considered and protected when a court considers the time, place, and manner of media coverage.

VI. FREEDOM OF THE PRESS

The First Amendment to our nation's constitution directs:

> Congress shall make no law . . . abridging the freedom . . . of the press . . . .

U.S. CONST. amend I. This amendment is applicable to the states through the Fourteenth Amendment. *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 855, n.1, 102 S. Ct. 2799, 2802, n.1, 73 L.Ed.2d 435 (1982); *Globe*, 457 U.S. at 603, 102 S. Ct. at 2618; *Grosjean v. American Press Co.,* 297 U.S. 233, 244, 56 S. Ct. 444, 446–447, 80 L.Ed. 660 (1936); *Gitlow v. New York,* 268 U.S. 652, 666, 45 S. Ct. 625, 629–630, 69 L.Ed. 1138 (1925).

Wisconsin's constitution provides a parallel protection:

> [N]o laws shall be passed to restrain or abridge the liberty of the press.

Wis. Const. Article I, § 3. The two constitutional provisions provide the same guarantee without any difference. *State of Wisconsin v. Robert T.*, 2008 WI App 22, ¶ 6, 307 Wis. 2d 488, 493, 746 N.W.2d 564 (*citing County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999)).

Access to the proceeding is not the issue here. However, it will be discussed for background. Throughout our history, criminal trials have been presumptively open. *Globe*, 457 U.S. at 605, 102 S. Ct. at 2619; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 100 S. Ct. 2814, 2823, 65 L.Ed.2d 973 (1980). This presumption is meant to assure that the proceedings are conducted fairly, to discourage perjury or misconduct, and to protect against biased decisions. *Richmond Newspapers, Inc.,* 448 U.S. at 556, 100 S. Ct. at 2816. The right of access to criminal trials is implicit in the First Amendment's guarantees of freedom of speech and of the press. *Globe*, 457 U.S. at 580, 102 S. Ct. at 2829. Another guarantee forming the basis for our open trials is the defendant's Sixth Amendment right to a public trial. That Sixth Amendment right always has been

recognized "as a safeguard against any attempt to employ our courts as instruments of persecution." *Estes v. Texas*, 381 U.S. 532, 539, 85 S. Ct. 1628, 1631, 14 L.Ed.2d 543 (1965). Its purpose was as a "guarantee that the accused would be fairly dealt with and not unjustly condemned." *Id.* at 538-539, 85 S. Ct. at 1631.

Similar to the right to inspect and copy judicial records, the right of access to the courts is not absolute. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L.Ed2d 570 (1978) ("access has been denied where court files might have become a vehicle for improper purposes . . . [such as] to gratify private spite or promote public scandal."). "The decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.*

The First Amendment does not grant the press a right to information about a trial that is superior to that of the general public. *Id.* at 609, 98 S. Ct. at 1318. Within the confines of a courthouse, a reporter's constitutional rights are no greater than those of any member of the public. *Id.* (*quoting Estes*, 381 U.S. at 589, 85 S. Ct. at 1663).

The National Association of Broadcasters and the Radio Television News Directors Association had conceded in their *amici curiae* brief in *Estes* that "neither [the First Amendment's freedom of the press nor the defendant's Sixth Amendment right to a public trial] speaks of an unlimited right of access to the courtroom on the part of the broadcasting media." *Estes,* 381 U.S. at 539-540, 85 S. Ct. at 1631.

The United States Supreme Court has unequivocally held that there is no constitutional right to record or broadcast court trials:

> In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black is 'a safeguard against any attempt to

> employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment 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.

Chandler, 449 U.S. at 569, 101 S. Ct. at 807 (*quoting Nixon*, 435 U.S. at 610, 98 S. Ct. at 1318). No court has found that the public has a right to televised trials. *Westmoreland v. Columbia Broadcasting System, Inc*., 752 F.2d 16, 22 (2nd Cir. 1984).

> [Cases] articulate a right to *attend* trials, not a right to view them on a television screen.

Id. at 23; *see also United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986)("[The *Chandler* holding] that television coverage is not always constitutionally prohibited, however, is a far cry from suggesting that television coverage is ever constitutionally mandated.")

Neither the Plaintiff, the Defendant, nor this Court have ever suggested limiting the media's access to the courtroom. That is a straw man created by MC out of whole cloth. Indeed, the courtroom which will be used in the upcoming trial has a designated area for media. As with print media, the courtroom is open to television media. As with print media, reporters from television media may listen and watch the proceedings. As with print media, reporters from television media may report trial information to the public. Any case-specific audio/video restriction which this Court may place on the media does not violate any constitutional right of the press or the public as it is within this Court's reasonable discretion.

VII. DUE PROCESS

The Fourteenth Amendment to our nation's constitution requires due process in all criminal proceedings:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend XIV, § 1.

Wisconsin's constitution, Art. 1, § 1, has been interpreted to provide the functional equivalent to the U.S. Constitution's due process provision. *Reginald D. v. State*, 193 Wis. 2d 299, 307, 533 N.W.2d 181, 184 (1995); *State v. Radke*, 2002 WI App 146, ¶ 6, 256 Wis. 2d 448, 457, 647 N.W.2d 873, 877.

Both the United States and Wisconsin constitutions demand not only substantive due process but also procedural. Due process "requires that time honored principles of a fair trial be followed." *Estes*, 381 U.S. at 535, 85 S. Ct. at 1629. Courts around this country have long recognized the risks that television coverage can pose for violation of a defendant's right to a fair trial.

> [M]assive adverse publicity and intrusion of representatives of the news media into the trial itself can so alter or destroy the constitutionally necessary judicial atmosphere and decorum that the requirements of impartiality imposed by due process of law are denied to the defendant.

Hilliard v. State of Arizona, 362 F.2d 908, 909 (9th Cir. 1966) (*citing Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L.Ed.2d 663 (1963); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961).

Court instruction to jurors and witnesses is not always a sufficient prophylactic to guard against all improper influence:

> [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof

> required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L.Ed. 749 (1927).

A. Jurors

Jurors are the nerve-center of the truth-finding process. *Estes*, 381 U.S. at 545, 85 S. Ct. at 1634. But, they can be adversely affected by the media at several stages. Our United States Supreme Court has recognized that pretrial publicity can infect potential jurors with preconceptions and bias:

> From the moment the trial judge announces that a case will be televised it becomes a cause celebre. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence.

Id.

Broadcasting of the trial itself can further improperly impact jurors:

> Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led not to hold the balance nice, clear and true between the State and the accused.

Id.

> Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury 'distraction.' . . . [W]e know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Id. at 546, 85 S. Ct. at 1634.

The lack of jury sequestration in a two-week trial, like this one, further increases media's impact on sitting jurors.

> Furthermore, in many [non-sequestration] States the jurors serving in the trial may see the broadcasts of the trial proceedings. . . [J]urors would return home and turn on the TV . . . . They would also be subjected to reenactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

Id. at 546, 85 S. Ct. at 1634-35.

Although courts always endeavor to conduct an error-free trial, there nonetheless is the potential for a necessitated retrial. Finding impartial jurors for a retrial can be all the more jeopardized by excessive media coverage:

> [N]ew trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later be called upon to sit in the jury box during the new trial.

Id. at 546-547, 85 S. Ct. at 1635.

A progeny of cases, from courts up to and including the Supreme Court, has recognized that live television broadcasting of a trial poses a clear risk of improperly influencing jurors.

B. Witnesses

As with jurors, witnesses are required by court order to appear at trial. As with jurors, media broadcast of the trial poses significant risks of adversely affecting witnesses in several ways.

- Awareness that the trial will be broadcast can have the effect of deterring witnesses from cooperating with a party or testifying in court.
- Watching broadcasts can nullify a court's sequestration order.
- Observing and hearing prior witness testimony can influence a witness to improperly shape their testimony.
- Knowing that their testimony will be watched by family, friends, and associates could motivate witnesses to concoct aspects of their testimony in a manner consistent with how they perceive others would want them to testify, in a manner to avoid harassment, or in a manner intended to protect their safety.

These threats to a fair trial have been recognized by our Supreme Court:

> The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot 'prove' the existence of such factors. Yet we all know from experience that they exist.
>
> In addition the invocation of the rule against witnesses [being privy to the testimony of other witnesses] is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings,

> notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

Estes, 381 U.S. at 547, 85 S. Ct. at 1635 (*cited in Hollingsworth*, 558 U.S. at 195, 130 S. Ct. at 713, 175 L. Ed. 2d 657 (2010)).

> Some of applicants' witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment.

Hollingsworth, 558 U.S. at 195, 130 S. Ct. at 713.

As is clear, broadcasting witness trial testimony presents hazards to the fundamental truth-finding function of trials.

C. Defendant

It is important to keep in mind that the reason behind open trials, as guaranteed by the First Amendment's rights to free speech and the press, as well as the Sixth Amendment's rights to a public trial and effective assistance of counsel, is to ensure that defendants receive a fair trial. *See* sec. VI, *supra*.

Defendants, themselves, can be directly impacted by deleterious media coverage.

> [W]e cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harassment, resembling a police line-up or the third degree. 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 . . . dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his

> day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system.

Estes, 381 U.S. at 549, 85 S. Ct. at 1636.

Consequently, the fair trial protected by the First and Sixth Amendments can be jeopardized by live television broadcasting.

D. Lawyers

Lawyers are not immune to the constitutional pitfalls of television coverage.

> [T]elecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect . . . upon the lawyers . . . .

Id.

Like a defendant's Sixth Amendment right to a fair trial, a defendant's Sixth Amendment right to the effective assistance of counsel can be compromised by television broadcasting.

E. Judges

Judges are entrusted with the solemn responsibility to ensure due process. That responsibility is made all the more difficult with the complications attendant to television coverage:

> A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions—aside from the two days of pretrial—was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it must be, his task is made much more difficult and exacting. And, as

> happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen.

Id. at 548, 85 S. Ct. at 1635.

It is clear that the effects of live television broadcasting of a trial can negatively impact all participants – jurors, witnesses, defendant, lawyers, and judge – so as to violate due process.

VIII. DANE COUNTY'S LIVESTREAMING EXPERIENCE

Dane County Circuit Courts have only one prior experience with livestreaming of a criminal trial – *State v. Halderson*, 2021CF1568. That trial was held in January of 2022 – a mere four months ago. Plaintiff, Defendant, and MC all point to that case as support for their position. However, the *Halderson* trial was unlike most trials. The vast majority of critical witnesses were professionals in various fields of criminal justice, *e.g.*, law enforcement, medical examiners office, crime laboratory. In the upcoming trial, as with most criminal trials, lay witnesses are pivotal to the search for the truth.

Lay and expert witnesses in the *Halderson* trial, as well as the defendant and the attorneys (both prosecution and defense), were maligned, berated, harassed, insulted, and threatened. The running public commentaries which aired with the livestream were more akin to the trash talk one would expect at a World Wrestling Federation bout than at a solemn, dignified courtroom trial.

As attorneys on both sides (who were also involved in the *Halderson* trial) explain, the livestreaming caused at least the following collateral consequences:

- re-victimized the family of the deceased (Pl. Br. Resp., court document 180, at 2);
- significantly disrupted the Plaintiff's presentation of evidence (*Id.*);
- harassed a witness with homophobic and profane messages (*Id.* at 5);
- prompted witnesses to plan escape routes from bizarre internet commentators (*Id.*);
- caused many prosecution witnesses to raise fears of testifying to prosecution staff (*Id.*);
- caused numerous witnesses to request police escort from the courtroom (*Id.* at 6);
- motivated a witness, enamored with his new found media fame, to baselessly accuse another witness of being a participant in the murders, which then fueled online commentators to perpetuate the baseless accusation (*Id.*);
- provided a platform for simultaneous public comments that were profane, abusive, misogynistic, and vulgar (*Id.*);
- caused several witnesses who were being harassed online to contact police for assistance (Pl. Letter, document 160 at 2);
- provided a platform for simultaneous public comments that criticized female attorneys and witnesses with derogatory statements about their hair, weight, clothing, and intelligence (*Id.*);
- provided a platform for simultaneous public comments ranking witnesses in order of desired sex partners (*Id.*);

- provided a platform for simultaneous public comments that attached crude and sexually explicit nicknames to people involved in the case (*Id.*);
- provided a platform for simultaneous public comments of a xenophobic nature criticizing witnesses who spoke English as a second language (*Id.* at 3);
- provided a platform for simultaneous public comments accusing witnesses whose memories were not perfect of being liars or co-conspirators (*Id.*);
- broadcast photographs of the deceased which prompted disturbing, inappropriate comments (*Id.*);
- caused witnesses to receive vile and threatening messages (Def. Letter Resp. , court document 179 at 2); and,
- caused at least one attorney to receive vile and threatening messages (*Id.*).

No defendant, victim, witness, attorney or court personnel should be subjected to such disrespect, trauma, and abuse. Media have no right to provide a livestream platform to simultaneously have trial participants used as fodder for public harassment, ridicule, and vulgarity. A trial is a dignified proceeding in which all participants are to be accorded proper respect. That did not happen in *Halderson*.[4]

IX. TIME, PLACE, AND MANNER

The common sense fears of trial courts, appellate courts, and the Supreme Court are well-founded:

> [Courts have] concerns with expenditure of judicial time on administration and oversight of broadcasting; the necessity of sequestering juries so that they

[4] As *Halderson* was the first Dane County jury trial livestreamed, there was no way that the court or parties could have known the abuse and indignities that would result.

> will not look at the television program of the trial itself; the difficulty in empaneling an impartial jury in the case of a retrial; the necessity of larger jury panels or increased use of marshals; the psychological effects on witnesses, jurors, lawyers, and judges; and related considerations of "solemnity," [and] "dignity," . . . .

Westmoreland, 752 F.2d at 23 (2d Cir. 1984).

> [J]udges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.

Deck v. Missouri, 544 U.S. 622, 631, 125 S. Ct. 2007, 2013, 161 L. Ed. 2d 953 (2005).

MC refers to the Plaintiff's and Defendant's concerns as "speculative" (MC Br., Court Document 174, at 1), "hypothetical" (*id.* at 2), and "abstract" (*id.* at 17). They are not. As recognized by the United States Supreme Court:

> The [proponent of media coverage] would dispose of all these observations [of risks to a fair trial posed by television coverage] with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that because these factors are difficult of ascertainment in particular cases they must be ignored. Nor are they 'purely hypothetical.' They are no more hypothetical than were the considerations deemed controlling in *Tumey, Murchison, Rideau and Turner*. They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure . . . .

Estes, 381 U.S. at 550, 85 S. Ct. at 1636.

The *Halderson* trial provided ample evidence of the disrespect and trauma that can be inflicted on trial participants through livestreaming. *See* sec. VIII, *supra*. Even if the *Halderson* trial were not considered, courts do not gamble with the defendants' constitutional right to due process, the victims' constitutional right to be treated with respect and dignity, the witnesses'

statutory right to be protected from harm and threats of harm, as well as the courts' solemn responsibility to ensure the dignity and decorum of proceedings. As stated by our Supreme Court:

> We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.

Id. at 540, 85 S. Ct. at 1632.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to **prevent** even the probability of unfairness.

Id. at 543, 85 S. Ct. at 1633 (*quoting In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955)) (emphasis added).

MC argues that criminal defendants, on appeal, have rarely been able to prove a deprivation of due process in order to receive a reversal of conviction and retrial. *See* MC Br. at sec. C. That is not the standard for trial courts striving to protect the right to a fair trial as well as maintain the dignity and decorum of court proceedings.

> Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. **Trial courts must be especially vigilant to guard against any impairment** of the defendant's right to a verdict based solely upon the evidence and the relevant law.

Chandler, 449 U.S. at 574, 101 S. Ct. at 809 (emphasis added).

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . **Reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception**. **The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.**

Seymour v. United States, 373 F.2d 629, 632 (5th Cir. 1967) (*quoting Sheppard v. Maxwell*, 384 U.S. 333, 362-363, 86 S. Ct. 1507, 1522, L.Ed.2d at 620 (1966)) (emphasis added).

To ensure due process, it is incumbent upon trial courts to *prevent* influences that could violate a defendant's right to a fair trial, intrude upon the solemn decorum of a trial, or otherwise infringe upon victim or witness rights. Prevention is, by definition, action taken before a harm is actualized. It is not properly termed hypothetical, speculative, or abstract. That duty of prevention is within the realm of trial court discretionary decision-making. Trial courts properly utilize their discretion in innumerable case situations. Generally, appellate courts defer to proper discretionary decisions of trial courts. The time, place, and manner of media activity in the courtroom is within the sound discretion of the trial court. *See, e.g., Seymour*, 373 F.2d at 632 ("we are convinced that the order before us falls within the ambit of permissible maintenance of judicial decorum and represents a reasonable implementation of the due process mandate to preserve at all costs an atmosphere essential to 'the most fundamental of all freedoms'- a fair trial").

Like *Halderson*, this case involves allegations that are particularly inhumane and gruesome. Exacerbating these allegations is the fact that the victims were well-known upstanding citizens of the community. Several jurors in the *Halderson* case had to be struck for cause due to pretrial publicity. It is reasonable to assume the same will be necessary in this case due to the pretrial publicity.

In *Halderson*, witnesses were harassed with homophobic, xenophobic, profane, abusive, misogynistic, sexually degrading, and vulgar comments. Some were threatened. Law enforcement had to be employed to ensure their safety. *See* sec. VIII, *supra*. It is reasonable to assume that, if livestreaming is allowed, the same witness harassment would occur here.

In *Halderson*, prosecution witnesses felt so harassed that they voiced fear about testifying to the district attorney's office. *See* sec. VIII, *supra*. It is reasonable to assume that, if livestreaming is allowed, witness trepidation about testifying would be even more pronounced, in that lay witnesses are more pivotal in this case. Plaintiff is understandably concerned about witnesses taking steps to not appear due to live broadcasting.

In *Halderson*, attorneys were harassed with sexually degrading comments, intellectual insults, and threats. *See* sec. VIII, *supra*. It is reasonable to assume that, if livestreaming is allowed, the same attorney harassment would occur here.

In *Halderson*, the livestreaming with running commentaries was as uncivilized and undignified as the jeering at WWF fights. It is reasonable to assume that, if livestreaming is allowed, the same lack of decorum would occur in this trial.

While recognizing the important function of a free press in informing a democratic citizenry about court proceedings, our U.S. Supreme Court qualified that "its function must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes*, 381 U.S. at 539, 85 S. Ct. at 1631.

Here, we primarily are addressing television coverage. The reason is obvious:

> While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

Id. at 548, 85 S. Ct. 1635.

> The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or

> infamous accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

Id. at 549–50, 85 S. Ct. at 1636.

In this case, more jurors are being summoned in due to pretrial publicity. Individual voir dire, drawing out the proceeding for hours, will be needed to address that pretrial publicity. Juries in Dane County are not sequestered for fiscal reasons. As such, there is no way this Court could realistically preclude jurors from watching a recorded livestream or reading the simultaneous commentaries; temptation and human nature are more than a verbal admonishment could be reasonably expected to overcome.[5] Like with jurors, there is no way this Court could realistically preclude jurors from watching a recorded livestream or reading the simultaneous commentaries; a verbal admonishment is insufficient to protect against violation of the constitutional right to a fair trial. The prosecution needs to call witnesses who, even before the issue of livestreaming was raised, have not been cooperative. It is reasonable for the prosecution to believe that livestreaming will only prove to make those witnesses' appearance in court even more difficult. Given the *Halderson* experience, it is reasonable to take steps to protect the defendants', victims', and witnesses' rights. Given the *Halderson* experience, it is reasonable to take steps to maintain the solemnity and decorum of the proceeding as well as ensure the safety and respect for all trial participants.

This Court, first and foremost, is considering the Defendant's constitutional right to a fair trial. Substantial consideration likewise is appropriate for the victims' constitutional right to be

[5] This analysis is to prevent violation of the right to a fair trial. It is not a postconviction review, requiring the nearly impossible showing of actual prejudice.

treated with dignity, respect, courtesy, sensitivity, and fairness. In addition, this Court is considering the witnesses' statutory right to be protected from harm and threats of harm. And, this Court's duty to ensure the solemnity and dignity of the proceedings is of utmost importance. As in *Hollingsworth*, the Plaintiff and Defendant here have well-demonstrated the realistic risks to a fair trial posed by unbridled trial recordings. As in *Hollingsworth*, MC has not alleged any harm if the trial is not broadcast:

> The balance of equities favors applicants. While applicants have demonstrated the threat of harm they face if the trial is broadcast, respondents have not alleged any harm if the trial is not broadcast. The issue, moreover, must be resolved at this stage, for the injury likely cannot be undone once the broadcast takes place.

Hollingsworth, 558 U.S. at 196, 130 S. Ct. at 713. Indeed, for almost a century and thousands of jury trials (as well as other court proceedings) in Dane County, television media have been capable of accurately and effectively reporting on jury trials without full live recordings. The one and only full live broadcast of a trial, *Halderson*, actually presents further evidence against live recordings. *See* sec. VIII, *supra*.

The above-described considerations, law, case facts, case concerns, and experience in the recent *Halderson* trial, inure to placing reasonable restrictions on media's time, place, and manner of coverage. Live streaming or rebroadcasting of the trial would create a setting wholly inappropriate for the administration of justice in this case. As MC asserts that no court can restrict its *usage* of any recording, this Court's order must address the recording stage itself.

Therefore, this Court deems it necessary and appropriate to take limited steps, in the upcoming trial and any potential retrial, to protect the rights and safety of the defendant, victims, witnesses, and other trial participants, as well as to maintain the solemnity and dignity of the court proceedings.

X. ORDER

For the reasons and bases stated in the above analysis, IT IS HEREBY ORDERED, for the jury selection and jury trial in the above-captioned case, that:

1. Media are allowed access to the proceedings;
2. Television media, like all other media, are allowed to listen, watch, and report on the proceedings;
3. Media are to position themselves in the 5A media room;
4. No audio or video recording equipment (e.g., professional equipment, smart phones, or any device capable of such recording) is allowed in the courtroom, including the media room;
5. No audio or video recording is allowed on the courthouse 5th floor. This includes recordings with professional audio/video equipment, smart phones, or any device capable of audio or video recording;
6. Still photography is only allowed from the media room and is only allowed of uniformed law enforcement officers, the defendant, the attorneys, and court personnel (judge, clerk, court reporter, bailiff);
7. No still photographs are allowed of jurors, lay witnesses, people in the courtroom's gallery, documents or exhibits on counsel table, exhibit images shown on the courtroom projection screen, or any person/ object not listed in #6 above; and,
8. No still photography, except as otherwise provided in this Order, is allowed on the courthouse 5th floor.

Violation of this Order is punishable by contempt of court.