

FEB - 7 2023

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

FILED BY

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IN AND FOR SUMMIT COUNTY, STATE OF UTAH

TERRY SANDERSON,

Plaintiff,

vs.

GWYNETH PALTROW; ERIC CHRISTIANSEN;
DEER VALLEY RESORT COMPANY; and JANE
AND JOE DOE EMPLOYEES 1 and 2,

Defendants.

MEMORANDUM DECISION

CASE NO. 190500048

Judge Kent Holmberg

This matter came before the Court for hearing on January 31, 2023, in connection with the plaintiff's Motion to Exclude Defendant Paltrow's Demonstrative Exhibit (Animations). At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authorities and counsel's oral argument. Being now fully informed, the Court rules as stated herein.

At issue are a series of animations (and still shots) generated by expert Brian Brill. The following dates are relevant to the Court's consideration of the pending Motion:

1. On May 13, 2021, defendant Paltrow provided her Rule 26(a)(4)(A) Expert Disclosures. Mr. Brill was identified as a Forensic Animation Specialist and Ski Expert expected to testify as follows: "Mr. Brill will create a demonstrative animation if (sic) the collision. He is expected to

counter Plaintiff's experts, including Plaintiff's ski expert, Greg Skordas. He will testify that based on the records and information, and assuming certain facts are true, Plaintiff collided into Ms. Paltrow. He will demonstrate that in his simulation. He will testify that Ms. Paltrow did not cause Plaintiff's asserted damages."

2. Mr. Brill's expert report was submitted on July 13, 2021. There were no animations included with Mr. Brill's report. The Court has reviewed Mr. Brill's report which was contained in defendant Paltrow's Exhibit 4.

3. Mr. Brill's proposed animations were submitted on September 12, 2022.

4. Defendant Paltrow provided "Updated" Animations on November 11, 2022. They consisted of the same September animations, with "minor changes to better depict the case [Paltrow] intends to make to a jury."

The key issue before the Court is whether Mr. Brill's computer-generated animations are substantive in nature or whether they simply constitute demonstrative exhibits. As a corollary, the hearing on the plaintiff's Motion raised a secondary issue, namely whether Mr. Brill should be required to testify because his animations are not simply illustrative of other

witness's testimony, but rather he has arrived at his own conclusions and his animations amount to substantive evidence.

In State v. Perea, 2013 UT 68, 322 P.3d 624, 636 (Utah 2013), the Utah Supreme Court contrasted evidence that is categorized as substantive or demonstrative:

Demonstrative evidence is evidence that is meant only to illustrate a witness's testimony. It carries no independent probative value in and of itself, but aids a jury in understanding difficult factual issues. Common examples of demonstrative evidence include models, charts, and timelines.

On the other hand, substantive evidence is "offered to help establish a fact in issue." In other words, relevant "[substantive] evidence directly affects the perceived likelihood that a fact of consequence has occurred" whereas the "effect of demonstrative evidence is to help clarify and make more understandable a piece of substantive proof." Common examples of substantive evidence include eyewitness testimony, ballistic reports, and security camera footage.

Id. (citations omitted).

Addressing the requirements of Rule 901 of the Utah Rules of Evidence in the context of computer-generated evidence, the court observed:

Because rule 901(a) of the Utah Rules of Evidence requires that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent

claims it is,” the distinction between substantive and demonstrative evidence is critical to understanding the foundational burden imposed on the evidence's proponent. If the evidence is merely demonstrative, then the proponent claims only that the proffered demonstrative evidence accurately illustrates the testimony given and rule 901 is satisfied so long as there is sufficient evidence to support the claim that it accurately depicts a witness's testimony as well as any uncontested relevant facts. Alternatively, in the case of substantive evidence, there must be some showing that the evidence itself supports the proffered conclusion.

Computer-generated evidence is simply a subset of general evidence and the categories of computer-generated evidence correspond with the two general categories of evidence. A “computer animation” demonstrates a witness's testimony and is therefore a subset of demonstrative evidence. As such, the witness does not use the computer animation to arrive at his or her conclusions. Rather, the animation is wholly illustrative of the witness's own conclusions drawn from the underlying substantive evidence.

In contrast, a “computer simulation” is substantive evidence used by the witness in drawing his conclusions.

[C]omputer-generated simulations are typically recreations of events or experiments based on scientific principles and data; in a simulation, data is entered into a computer, which is programmed to analyze and draw conclusions from the data. Computer simulations are [therefore a type of] substantive evidence offered to support a fact in issue and have independent evidentiary value. Computer simulations do not just illustrate an expert's conclusions but are submitted as substantive evidence with independent probative value. As a subset of substantive evidence, computer simulations must therefore meet a higher threshold showing than that required for demonstrative evidence.

Id. at 636-636 (citations omitted).

Applying these principles, the Perea court determined that the trial court erred in refusing to admit two computer-generated animations that correlated to the testimony of a crime scene reconstruction expert. The court determined that the animations were sufficiently authenticated even though the expert could not testify as to how the animations were created, but where the expert could confirm that the animations accurately represented his expert interpretation of the facts. The court noted that “[b]ecause computer animations are merely a subset of demonstrative evidence, it is not necessary that the testifying witness know how the animation was created. ... Rather, it is sufficient that the animation accurately reflects the witness's testimony.” Id. at 637. As it has been presented to the Court, the animations at issue are largely a compilation of other witness’s testimony. Though the Court inquired about how each animation would be introduced and whether each witness could confirm that a particular animation represented his or her expert testimony, this issue was not fully resolved at the hearing.

Further complicating matters, it remains unclear whether the animations are wholly illustrative of other witnesses’ testimony or whether Mr. Brill has incorporated a certain level of

his own, independent assumptions and conclusions in the creation of the animations, such that he is functioning as a more substantive expert. On this point, the defense emphasized that Mr. Brill did not seek to recreate the events at issue in this case, but rather to present a visual of other witness' recollection, understanding and expert testimony. Defense counsel indicated during the hearing that Mr. Brill did not reach any independent conclusions. Further, in addressing the timing of the disclosure of Mr. Brill's animations, defense counsel suggested that it was impossible for Mr. Brill to create the animations earlier because discovery was ongoing.

Having carefully reviewed Mr. Brill's expert report and viewed the animations at issue, the Court determines that the nature of the animations and indeed Mr. Brill's role and function as an expert in this matter is not readily apparent. For instance, while the defense avers that the animations are accurate in portraying events as testified to by other witnesses, Mr. Brill's expert report indicates that his animations were not limited to facts and data gathered from other witnesses. Rather, it appears that he was required to make substantive judgments about the geography and topography of the area where the accident occurred. He speaks of gathering geographic data, conducting a site visit and collecting certain data points to create a model of the area. Mr. Brill's report also addresses the inclusion of biped models to illustrate "various possible scenarios or opinions by expert witnesses." (Brill Expert Report at p. 2). To the extent that Mr. Brill is functioning in a more substantive role and his animations are the

product of certain independently derived facts and data, then it is possible that the defense has not fully disclosed his opinions and supposition.

Given the uncertainties identified by the Court above and in its gatekeeping function, it is appropriate for the Court to conduct a pretrial evaluation of both the admissibility of the animations and the nature of Mr. Brill's involvement in this case as an expert witness. Thus, Mr. Brill will be required to testify regarding the principles and methodology underlying his creation of the animations. Mr. Brill should be prepared to address whether he conducted any independent analysis, including with respect to the positioning, speed, trajectory and motion of the biped models he incorporated into the animations. The Court is also interested in learning whether Mr. Brill's data points included independently derived geographic and/or topographic information.

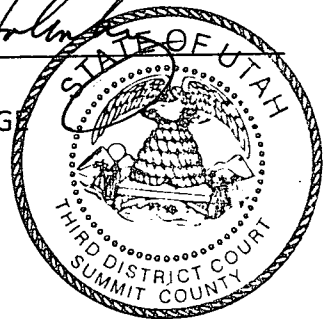
As a corollary, the Court will delve deeper into the plaintiff's concerns about Mr. Brill's undisclosed opinions, the lack of notice and surprise, all resulting in alleged prejudice. The Court will expect Mr. Brill to testify as to why he could not have submitted the animations with his corresponding expert report and, more particularly, what additional discovery was needed for the animations to be created and produced in a more timely manner.

Based on the foregoing, the Court defers ruling on the plaintiff's Motion to Exclude Defendant Paltrow's Demonstrative Exhibit (Animations). Counsel should contact the Court's clerk to schedule a hearing for Mr. Brill to testify.

This Memorandum Decision will stand as the Order of the Court and no further order is required.

Dated this 7th day of February, 2023.


KENT HOLMBERG
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 190500048 by the method and on the date specified.

EMAIL: JAMES EGAN JEGAN@EOLAWOFFICE.COM

EMAIL: STEPHEN OWENS SOWENS@EOLAWOFFICE.COM

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EMAIL: LAWRENCE BUHLER LBUHLER@ME.COM

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02/07/2023

/s/ BRIDGETTE BLONQUIST

Date: _____

Signature

IN THE THIRD DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

TERRY SANDERSON, Plaintiff and Counterclaim Defendant, vs. GWYNETH PALTROW, Defendant and Counterclaim Plaintiff.	DECORUM ORDER Case No. 190500048 Judge: Kent R. Holmberg
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The court enters this Decorum Order (“the Order”) pursuant to section 78A-2-201 of the Utah Code Annotated, Utah Rules of Judicial Administration 4-401.01 et. seq. and the court’s inherent authority to control the proceedings.

The Order establishes standards of conduct for those attending the jury trial in this case, which is scheduled to begin March 21, 2023. The objectives of the Order are to:

- Secure the parties’ right to a fair and impartial jury trial;
- Protect against unfair prejudice to the parties;
- Permit the public access to civil legal proceedings;
- Allow for electronic media coverage of civil legal proceedings;
- Ensure the orderly and efficient management of civil legal proceedings; and
- Protect the privacy and safety of the participants.

To achieve these objectives, the court orders the following:

DECORUM ORDER

1. This Order (and its attachments which are incorporated herein by reference) shall govern the conduct of all court personnel, news reporters, and members of the public attending the trial.

Public Courtroom Seating

2. Courtroom B has limited seating. The number of Spectators shall not exceed courtroom capacity.

- a. Seating in the first row behind the plaintiff's table shall be reserved for family members and those appearing in support of Plaintiff and for use by the plaintiff's attorneys.
- b. Seating in the first row behind the defense table shall be reserved for family members and those appearing in support of Defendant and for use by the defendant's attorneys.
- c. The rear-most row on the short side of the seating area is reserved for the bailiffs.
- d. The remaining rows shall be open for general seating.

Entering and Exiting the Courtroom

3. Entering and exiting the courtroom shall occur without disruption or distraction. If a person exits the courtroom during the proceedings, that person will need to remain outside the courtroom until the jury has left the courtroom for a recess. This provision does not apply to the parties and their legal teams.

4. At the end of court proceedings, spectators shall remain in the courtroom until the jury, the judge, and the parties have withdrawn and the bailiff gives permission to leave.

Conduct of Spectators

5. The terms "Spectator" or "Spectators," as used in this Order, include all persons attending the proceedings, including news reporters, but excluding court personnel, counsel, or their support staff.

6. All Spectators shall be quiet and orderly. This means no talking, shaking of the head, gestures, outbursts or any other signals or signs of approval or disapproval of anything which happens in the courtroom.

7. Persons in the courtroom must be dressed in appropriate courtroom attire.

8. No Spectator shall make audible comments of any kind during trial or related proceedings.

9. No Spectator shall engage in provocative, disruptive, distracting, or uncivil behavior of any kind.

10. No Spectator shall wear or display pins, buttons, signs, clothing, or photographs expressing support for or against either party in this case.

11. No Spectator shall be permitted to pass the bar or enter into the well of the courtroom without judicial authorization.

12. Spectators shall consider the age of children and the length of court sessions when deciding whether to bring children into the courtroom. Children whose age or capacity is incompatible with prolonged silence and restricted movement shall not be brought into the

courtroom. Spectators who supervise a child who becomes restless or disruptive shall immediately remove the child from the courtroom.

13. Spectators shall not bring newspapers or magazines into the courtroom.

14. All non-jurors should avoid communicating in any manner with a member of the jury panel, juror or alternate, before the return of a final judgment in the trial. Any violation may be punished as contempt of court.

Use of Portable Electronic Devices

15. As used in this Order, the term “portable electronic device” has the same definition as in Rule 4-401.02 of the Utah Code of Judicial Administration, a copy of which Rule is attached to this Order.

16. Spectators may not use portable electronic devices inside the courtroom.

17. Portable electronic devices shall be placed on “silent” mode. Any portable electronic device that gives an audible alarm or signal during court proceedings shall be secured by the bailiff and retained until the end of that court day, at which time it shall be returned to the owner. This provision does not apply to the parties and their legal teams.

18. Unless authorized by the court under Rule 4-401.01 (a copy of which is also attached to this Order) or Rule 4-401.02 of the Utah Code of Judicial Administration, no one shall use a portable electronic device to record, photograph, or transmit images or sound of court proceedings.

19. No spectator shall tweet or text message information about the trial to trial witnesses excluded from the courtroom under Rule 615 of the Utah Rules of Evidence.

20. Use of portable electronic devices in violation of this Order shall result in the Spectator being removed from the courtroom.

21. During trial and jury selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case. Once selected, jurors shall not use a portable electronic device while in the courtroom and shall not possess a portable electronic device while deliberating. Expert witnesses are not subject to this provision.

22. Witnesses who have been excluded from the courtroom shall not view or listen to accounts of other witness testimony or speak to other witnesses about the subject matter of their testimony before testifying.

Additional Orders Related to News Reporters and EMC

23. Media representatives shall identify themselves and produce appropriate identification (photo ID).

24. The terms "Electronic Media Coverage" ("EMC") and "News Reporter" have the same meaning as in Rule 4-401.01 of the Utah Rules of Judicial Administration.

25. EMC of the trial and related proceedings shall be permitted subject to the terms of this Order and any subsequent order related to or restricting EMC.

26. News reporters shall comply strictly with this Order and all provisions of Rule 4-401.01. Failure to do so shall subject the news reporter to contempt sanctions allowed by law, removal from the trial and related proceedings, and (in the discretion of the court) termination of EMC.

27. Recording or transmitting images or sound of the trial or related proceedings without the express permission of the court is prohibited.

28. EMC of the trial and related proceedings is permitted provided that news reporters make a timely written request as required under Rule 4-401.01 of the Utah Code of Judicial Administration.

29. Unless otherwise approved by the judge or the judge's designee, EMC is limited to one audio recorder and operator, one video camera and operator, and one still camera and operator, unless otherwise approved by the Court. In this case, the court will be approving CourtTV for EMC. The terms of this approval will be included in a separate order. CourtTV shall arrange a "kill switch" permitting the judge to stop all dissemination of proceedings.

30. If more than one news reporter has requested permission to provide EMC of the trial or related proceedings, it is the responsibility of news reporters to determine who will participate at any given time, how they will pool their coverage, and how they will share audio, video, or photographic files produced by pool coverage.

31. Pool equipment operators shall use equipment that is capable of sharing audio, video, and photographic files to pool recipients in a generally accepted format.

32. The pooling arrangement shall be reached before the trial or proceedings commence and without imposing on the judge or court staff.

33. Neither the judge nor court staff shall be called upon to resolve disputes concerning pooling arrangements.

34. Due to the size of the courthouse common areas, no media broadcasting or interviews will be permitted inside the courthouse unless the court designates a location at some later date. No media interviews are permitted with any juror until they are excused from jury service. No media interviews are permitted of any witness until that witness has been

released from any subpoena or, if not a subpoenaed witness, until the court has released the witness from further participation in the trial.

35. The parties have agreed that no media interviews will be permitted of the parties, the parties' family members, the attorneys, or the attorney's staff during the trial.

36. The court expects the media to respect the wishes of all individuals involved in this trial if they do not wish to be interviewed or if they wish to end an interview.

37. Tania Mashburn, the public information officer for the courts, may meet periodically with news reporters before and during the trial to address unforeseen circumstances impacting the news reporters' ability to provide meaningful EMC of the trial and related proceedings.

38. At no time will a potential juror, juror, or alternate be photographed. Once a final judgment has been entered in the trial, then a potential juror, juror, or alternate may voluntarily consent to his/her photographing outside of the secure area.

39. At no time will a witness who is a minor or in the courtroom be visually recorded or photographed. Audio recordings of a minor will be allowed unless otherwise prohibited by the Court. Ms. Paltrow's children are not to be asked about any private information such as where they live, where they attend school, and with whom they live.

40. No visual recording or photographing of court employees is permitted in the courtroom without prior approval. This includes the judge, bailiff, sheriffs deputies, court reporter (if present), court coordinator, and others.

41. No audio recording is permitted of conferences involving counsel at the respective counsel tables or bench conferences with the judge. No visual recording of the lips,

so as to be readable by a lip reader, of conferences involving counsel at the respective counsel tables or bench conferences with the judge is permitted. No one may "zoom in" on anything on counsel's tables to identify any writings.

42. News reporters shall address complaints and concerns to the public information officer.

Copies of the Order to Be Posted and Read

43. Copies of this Order shall be posted outside the courtroom. A copy may also be requested by email (addressed to 3rdsilversummitteam@utcourts.gov).

44. All spectators shall read and comply with the terms of this Order.

45. In their written request for permission to provide EMC of the trial and related proceedings, news reporters shall certify that they have read and understand this Order and its attachments.

46. As needed to ensure compliance, notice of this Order may also be given verbally by security personnel.

Penalties for Violations

47. Anyone who willfully violates the terms of this Order shall be subject to contempt sanctions or other sanctions which may include:

- a. An order of temporary or permanent exclusion of the offender from the courtroom and security areas;
- b. An order of temporary or permanent exclusion of the media organization represented by the offender from the courtroom and security areas;

- c. A charge of contempt of court; and
- d. Such other sanctions as deemed necessary by the judge. to ensure the due and proper administration of justice.

48. Anyone who violates this Order may be removed from part or all of the trial or related proceedings, or lose further access to live electronic proceedings.

SIGNED March 8, 2023.

BY THE COURT


HON. KENT R. HOLMBERG
Third District Court Judge



West's Utah Code Annotated
State Court Rules
Code of Judicial Administration
Chapter 4. Operation of the Courts
Article 4. Internal Court Operations

UT R JUD ADMIN Rule 4-401.02

Rule 4-401.02. Possession and Use of Portable Electronic Devices

Effective: November 1, 2021

Currentness

Intent:

To permit the use of portable electronic devices in courthouses and courtrooms, subject to local restrictions.

Applicability:

This rule applies to the courts of record and not of record.

Statement of the Rule:

(1) Definitions.

(A) "Judge" as used in this rule means the judge, justice, or court commissioner who is presiding over the proceeding.

(B) "Portable electronic device" as used in this rule means any device that can record or transmit data, images or sounds, or access the internet, including a pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, or electronic calendar.

(C) "Court proceeding" means any trial, hearing or other matter, including proceedings conducted by remote transmission.

(2) Possession and Use of Portable Electronic Devices in a Courthouse.

(A) A person may possess and use a portable electronic device anywhere in a courthouse, except as limited by this rule or directive of the judge.

(B) All portable electronic devices are subject to screening or inspection at the time of entry to the courthouse and at any time within the courthouse in accordance with Rule 3-414.

(C) All portable electronic devices are subject to confiscation if there is reason to believe that a device is or will be used in violation of this rule. Violation of this rule or directive of the judge may be treated as contempt of court.

(D) The Judicial Performance Evaluation Commission may record and transmit video and sound of court proceedings to evaluate the performance of justice court judges subject to a basic evaluation. These recordings and transmissions are not public, pursuant to Utah Code sections 63G-2-201(3) and 78A-12-206.

(3) Restrictions.

(A) *Use of Portable Electronic Devices in Common Areas.* The presiding judges may restrict the time, place, and manner of using a portable electronic device to maintain safety, decorum, and order of common areas of the courthouse, such as lobbies and corridors.

(B) *Use of Portable Electronic Devices in Courtrooms.*

(i) A person may silently use a portable electronic device inside a courtroom.

(ii) A person may not use a portable electronic device to record or transmit images or sound of court proceedings, except in accordance with Rule 4-401.01 or subsection (2)(D) above.

(iii) A judge may further restrict use of portable electronic devices in his or her courtroom. Judges are encouraged not to impose further restrictions unless use of a portable electronic device might interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceedings, or threaten the interests of a minor.

(iv) During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Once selected, jurors shall not use a portable electronic device while in the courtroom and shall not possess an electronic device while deliberating.

(C) *Use of Portable Electronic Devices While Viewing Court Proceedings Conducted by Remote Transmission.*

(i) A person may not use a portable electronic device to record, photograph, or transmit images or sound of court proceedings, except in accordance with rule 4-401.01 or subsection (2)(D) above. Access to court proceedings will be contingent on the person agreeing to comply with the provisions in this rule and any administrative or standing orders that supplement this rule.

(ii) A violation of an administrative or standing order may be treated as contempt of court.

(4) Use of Portable Electronic Devices in Court Chambers. A person may not use a portable electronic device in chambers without prior approval from the judge.

(5) Instruction to Witnesses. It should be anticipated that observers in the courtroom will use portable electronic devices to transmit news accounts and commentary during the proceedings. Judges should instruct counsel to instruct witnesses who have been excluded from the courtroom not to view accounts of other witnesses' testimony before giving their own testimony.

Credits

[Adopted effective April 1, 2013. Amended effective November 1, 2019; November 1, 2020. Amended September 28, 2021, effective November 1, 2021.]

Judicial Administration Code Rule 4-401.02, UT R J ADMIN Rule 4-401.02

Current with amendments received through February 15, 2023. Some rules may be more current, see credits for details.

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IN THE THIRD JUDICIAL DISTRICT JUVENILE COURT
THIRD DISTRICT COURT, COURT OF APPEALS, SUPREME COURT

**IN RE: PHOTOGRAPHY, FILMING,
AND RECORDING IN COURTHOUSE**

ADMINISTRATIVE ORDER
ORDER NO.

THIS COURT FINDS AS FOLLOWS:

The Court is concerned about decorum and the protection of persons doing business within the courthouse. The Court is also concerned about individuals being photographed, filmed, or recorded without their knowledge or permission. The presiding judge has authority under Rule 4-401.02 to restrict use of portable electronic devices in common areas. The purpose of this Order is to establish parameters for photographing, filming, and recording within the courthouse.

IT IS HEREBY ORDERED that there shall be no photographing, filming, or recording in common areas of the courthouse except as provided below. The courthouse includes all areas within the exterior walls of the building. Common areas include entrances and exits, lobbies, hallways, stairs, elevators, and business offices. This Order is not intended to restrict these activities when conducted on court premises outside the

entrances and exits to the courthouse, provided the activities do not obstruct access to or from the building, or compromise security. Activities that obstruct access or compromise security will be considered a violation of this Order.

Photography, filming, and recording are permitted in the following area(s):

Matheson Courthouse:

- Public hallways and Rotunda on 3rd and 4th floors;
- Rotunda area only on 1st and 5th floors; and
- No recording on 2nd floor.

West Jordan Courthouse

- North side of the main door(s) on the 1st floor;
- No recording on 2nd floor.

Tooele Courthouse

- North side of the main door(s) on the 1st floor;
- No recording on 2nd floor.

Silver Summit Courthouse

- Outside – East of the main doorway entrance

Any photography, filming, or recording must be conducted with minimal noise and may not interfere with courthouse business.

Cameras and recording devices, and camera-enabled devices that capture digital images or record sounds, such as cell phones, tablets, or watches, may be brought into the

courthouse as long as the image capturing and recording features are not activated, used, or displayed, except as otherwise provided in this Order. Law enforcement officers with body cameras shall not activate the recording function of the cameras unless involved in a law enforcement activity in the courthouse.

This Order is not intended to interfere with or restrict the rights of the media to request permission from a judicial officer to allow media coverage within a particular courtroom, nor to interfere with the ability of each judicial officer to rule on such media requests, consistent with Rule 4-401.01.

The media may seek permission to photograph, film, or record in individual circumstances in a location other than those identified in this Order. The requests will be considered and a response provided by the judge presiding over the case that has drawn media attention. Any such requests must be submitted to the Court's Communication Director, who will forward requests to the appropriate judge. The judge may grant the request conditioned on the requester complying with the other restrictions in this Order.

Special requests for photographing, filming, or recording in courtrooms, jury rooms, or conference rooms for purposes such as investitures or taking an oath of office must be made in writing to the Court's Communication Director or the judge presiding over that courtroom. Decisions on those requests will be made in accordance with policies established by the Judicial Council.

A violation of this Order may be the basis for being removed from the courthouse, an order to show cause for contempt, or confiscation of personal electronic devices.

This Order shall be provided to court employees and security officers and shall be conspicuously posted at entrances to the courthouse. This Order shall be made available to anyone upon request.

IT IS SO ORDERED.

DATED this 28th day of February, 2011



Matthew B. Durrant,
Chief Justice
Supreme Court



Gregory K. Orme,
Presiding Judge
Court of Appeals



Julie Lund,
Presiding Judge
Third Juvenile Court



Randall Skanchy,
Presiding Judge
Third District Court

COMMONWEALTH OF MASSACHUSETTS

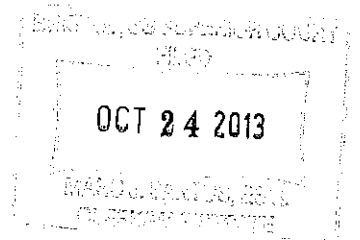
BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

MEMORANDUM OF DECISION AND ORDER ON
COMMONWEALTH'S MOTION FOR RECUSAL

The Commonwealth has moved that I recuse myself from this case on the grounds that I am biased against the Commonwealth and First Assistant District Attorney ("A.D.A.") William McCauley.¹ For the reasons set forth below, the motion is denied.²

I harbor no bias against the Commonwealth or against A.D.A. McCauley (or against the defendant).³ I am free of any disabling prejudice towards the Commonwealth and its attorneys. Considerations other than the law have not and will not influence any of my rulings. I do not fear or favor the Commonwealth or the defendant. A person aware of all the facts and circumstances would not reasonably question my impartiality.

"A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the

¹ The motion was filed on October 9, 2013 after the completion of a scheduled Pre-Trial Conference in this case, twenty-two days after the Order for Special Assignment had been docketed. Notwithstanding the position taken by the Commonwealth in its Motion for Recusal, it did not request the Court to defer hearing and acting upon the defendant's contested Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents or other scheduled matters.

² Following the hearing on the Commonwealth's Motion for Recusal held on October 21, 2014, the Court issued an oral ruling denying the motion and indicated, at that time, that it would be filing a written decision within a few days.

³ The defendant opposes the Commonwealth's Motion for Recusal.

judge has a personal bias or prejudice concerning a party or a party's lawyer" Supreme Judicial Court Rule 3:09, Canon 3(E)(1)(a). Recusal generally is left to the discretion of the trial judge. Haddad v. Gonzalez, 410 Mass. 855, 862 (1991) (holding that isolated statements of judge, viewed in the context of a fourteen-day trial, did not support a claim of bias). When faced "with a question of [her] capacity to rule fairly, the judge [must] consult first [her] own emotions and conscience." Lena v. Commonwealth, 369 Mass. 571, 575 (1976). If the judge concludes that she is free from disabling prejudice, she "must next attempt an objective appraisal" of whether her impartiality might reasonably be questioned. Id.

With respect to the Commonwealth's claim that "it does not believe that Judge Garsh can be free of bias against the Commonwealth,"⁴ the motion for recusal focuses upon this Court's rulings in an unrelated case that was tried before me in 2010; A.D.A. McCauley and then Assistant District Attorney Cynthia Brackett represented the Commonwealth. The allegation of bias is not supported by a factual basis. Some of my rulings in that case were in favor of the Commonwealth and some were not, as is the case in all of the other criminal cases over which I have presided over the last twenty years.⁵ This is not the place to analyze the rulings made in that case, the reasons for which are articulated in the public record.⁶ The defendant in that case was convicted of murder in the

⁴ The Commonwealth's Motion for Recusal states that it "relies on the attached memorandum and the prior motion and affidavit to recuse previously submitted in the case of Commonwealth v. Eric Durand." That prior motion for recusal, in turn, states: "In support of this request, the Commonwealth states that it does not believe that Judge Garsh can be free of bias against the Commonwealth." That prior affidavit states, in part, that the affiant believed that this Court's conduct "evidenced a bias against the Commonwealth . . ." and that a particular ruling of the Court "evidenced a bias toward the Commonwealth."

⁵ No other prosecutor has ever sought my recusal on the grounds that I am biased against the Commonwealth. Ms. Brackett appeared before me after she had represented the Commonwealth in the 2010 case with A.D.A. McCauley; she did not seek my recusal. Co-counsel in this case, A.D.A. Patrick Bomberg, has appeared before me numerous times. He, likewise, has never sought my recusal.

⁶ A copy of the transcript of the trial proceeding on June 17, 2010, which was not included in the Commonwealth's filing, has been placed in the file of this case.

second degree. The appeal of that conviction is pending. "The mere fact that a party suffers adverse rulings during litigation does not establish lack of judicial impartiality." Clark v. Clark, 47 Mass. App. Ct. 737, 739 (1999).

To the extent that the motion independently seeks that I recuse myself for bias against A.D.A. McCauley in connection with that prior case, there is no basis for me to do so. Moreover, "[t]o show that a judge abused [her] discretion by failing to recuse [her]self, a [litigant] ordinarily must show that the judge demonstrated a bias or prejudice arising from an extrajudicial source, and not from something learned from participation in the case" or in an earlier proceeding. Commonwealth v. Adkinson, 442 Mass. 410, 415 (2004), citing Liteky v. United States, 510 U.S. 540, 551(1994) ("not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings"). I have examined my emotions and consulted my conscience, and I am satisfied that I harbor no bias as a result of anything that may have transpired either in the 2010 case or by virtue of any of A.D.A. McCauley's reported out-of-court statements to the media following that case. The mere assertion of an extrajudicial source does not necessarily establish bias. Liteky, 510 U.S. at 554.

The Commonwealth argues in its Memorandum that recusal is required because public confidence may be shaken in view of the "well-known and publicly documented history of antagonism – a history that has, in the past, generated broad public comment and concern." There is no documented history of any antagonism by this judge toward A.D.A. McCauley. As far as A.D.A. McCauley's views of this judge, the "history" consists of one local newspaper article, a follow-up-letter to the newspaper, and a newspaper blog posting. The article, captioned "Duarte gets

life in prison for 15-year old's killing," appeared on July 2, 2010.⁷ It states, in part:

After the verdict, in an unusual post-trial move, co-prosecutor William McCauley, in a statement, harshly criticized Garsh for showing "antagonism to the commonwealth's case throughout the course of the trial."

Citing judicial ethics, Garsh declined to respond.

The article further states that McCauley was "critical of Garsh," and purports to quote from A.D.A. McCauley, including the statement, "[w]e expect and demand more from the witnesses and the judges who hear these most serious cases." The article pointed out that "Garsh declined to respond to McCauley's remarks when approached in her chambers. She said she is prevented by the judicial canon of ethics from responding because an appeal in the case is possible." Following publication of this article, a letter from an attorney commenting on the statements attributed to A.D.A. McCauley was published on July 10, 2010.⁸ The blog post, published on July 12, 2010, was captioned, "Defense bar stands up for judge criticized by prosecutor." It repeated remarks critical of this judge attributed to A.D.A. McCauley in the first article, quoted from the letter that had been published, and also contained statements from the defense counsel in the 2010 case.⁹ The blog entry included the statement that "Garsh has said that the judicial canon of ethics prevents her from responding to that statement."

An objective reader of these materials would not reasonably question my impartiality. Instead, the reasonable observer would only conclude that in our adversarial criminal justice system,

⁷ <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100702/NEWS/7020327>.

⁸ <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100710/OPINION/7100340/-1/OPINION02>.

⁹ <http://blogs.southcoasttoday.com/new-bedford-crime/2010/07/12/defense-bar-stands-up-for-judge-criticized-by-prosecutor/>.

one or both adversaries is often unhappy with the rulings of the judge.¹⁰

The Commonwealth points to the fact that, after the special assignment in this action was docketed, the 2010 statements attributed to A.D.A. McCauley resurfaced in the media. The Commonwealth cites one such story that was captioned “Hernandez judge described as ‘extremely astute and always fair,’” which appeared in several media outlets.¹¹ The Commonwealth states that this article recited “several past points of conflict.” It did not. It simply referenced some of the 2010 statements attributed to A.D.A. McCauley.

The Commonwealth also argues that “[t]he relentless public focus on any signs of friction between judge and prosecutor that this initial story augers might reasonably impair the ability of each to execute his or her sworn duties effectively. Indeed, this is already arguably the case.”¹² I am confident that my ability to be fair and impartial to the Commonwealth and to the defendant has not been and will not be affected by that story or by any like stories and that an objective person would not reasonably question my impartiality. That the Commonwealth may believe that A.D.A.

¹⁰ “A judge lives in an atmosphere of strife, in which by nature and experience, he is expected to be a man of ‘fortitude.’ He must continually rule against one party or another. No judge can be so sanguine as to believe that he is never the object of disapproval and criticism directed to something more personal than his abstract judicial actions. If such disapproval is brought openly to his attention he does not automatically change from benign to biased. It is neither practical nor reasonable to liken a judge to an ostrich, unconcerned so long as his head is in the sand . . . We have found no case which suggests that an affidavit must be ruled to be sufficient simply because it might be natural for a judge to have resented something said about him.” *In re Union Leader Corp.*, 292 F. 2d 381, 389 (1st Cir. 1961) (citations omitted) (denying petition for writ of mandamus to order judge to disqualify himself from conducting proceedings in case in which newspaper, which had been highly critical of judge, was a party), cert. denied, 368 U.S. 927.

¹¹ E.g., http://www.heraldnews.com/news/x1843593643/Hernandez-judge-described-as-extremely-astute-and-always-fair?zc_p=1.

¹² To the extent that the assertion in the Commonwealth’s Memorandum that “this is already arguably the case” is referring both to how the prosecutor and this judge already had been executing their duties, the Court notes that the Commonwealth’s Memorandum was filed in the courtroom at the outset of the pre-trial conference before this judge had presided over any matter in this case and before this judge had made any ruling in the case other than an order requiring that the Commonwealth’s opposition to the defendant’s Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents be filed by a certain date.

McCauley might be impaired in the performance of his duties is not grounds for recusal.

Finally, the Commonwealth argues that it is immaterial whether the media has accurately reflected the true status of what the Commonwealth characterizes as the “parties’ relationship” because “this history will be exploited and sensationalized by the media before and during trial”¹³ “Publicity alone cannot create a reasonable doubt as to the judge’s impartiality The mere fact that the issue of disqualification . . . has drawn the attention of the media, resulting in extensive coverage, is not, in itself, a good reason to reassign this case. The adoption of this view would lead to judicial abandonment of responsibility for the purity of the judicial process and ultimately undermine the independence and integrity of the courts.” United States v. Alabama, 582 F. Supp. 1197, 1208 (N.D. Ala. 1984), *aff’d*, 762 F.2d 1021 (11th Cir. 1985).

When A.D.A. McCauley apparently chose to make remarks to the press in 2010, he knew or should have known that his statements would create the very “history” the Commonwealth now is using as the basis for seeking recusal. To require recusal in these circumstances, on the basis that there is an appearance of bias arising from media reports, would allow attorneys to use the media as a device to set up a judge for future recusal.¹⁴ In effect, by complaining about a judge to the media,

¹³ The Commonwealth cites United States v. Cepeda-Penes, 577 F.2d 754, 758 (1st Cir. 1978) for the proposition that public confidence may be shaken as much by publicized inferences of bias that are false as by those that are true. The Court did not so state. It stated, “we do not think that . . . a ‘reasonable factual basis for doubting the judge’s impartiality’ may be inferred solely on the basis that *the press* may have misinterpreted some action taken during the proceedings.” *Id.* (emphasis in original). Spires v. Hearst Corp., 420 F. Supp. 304, 307 (D. C. Cal. 1976), also cited by the Commonwealth, is wholly inapposite. In that case, the plaintiffs’ lawsuit concerned their positions as former newspaper dealers for the Los Angeles Herald Examiner and their treatment by that newspaper. After the lawsuit had been initiated, an article appeared in the Los Angeles Herald Examiner that was extremely complimentary of the trial judge and which stated that the judge had been nominated to the United States Ski Hall of Fame by the newspaper’s ski writer. Not surprisingly, the trial judge agreed that his impartiality might reasonably be questioned, and he recused himself.

¹⁴ “Federal case law, though not binding, is instructive, as the statute governing recusal of Federal judges includes an inquiry into whether a judge’s ‘impartiality might reasonably be questioned.’” Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 10 n. 17 (2013). Numerous federal courts have held that criticism of a judge in the media is not sufficient to support a charge of bias or appearance of bias on the part of the judge toward the

thereby generating news stories, an attorney would have the means to exercise veto power over a judge he or she did not wish to hear that attorney's cases. "The rules governing the recusal of a judge are not intended to provide litigants with a means of obtaining a judge of their choice." Edinburg v. Cavers, 22 Mass. App. Ct. 212, 217 (1986).

critic. See, e.g., United States v. Olander, 584 F.2d 876, 887 (9th Cir. 1978) (motion to disqualify properly denied where defendant had been leader in efforts to impeach the judge, and there had been widespread publicity and news coverage about the impeachment campaign), vacated on other grounds, 443 U.S. 914 (1979); In re United States, 666 F.2d 690, 695 (1st Cir. 1981) ("Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendoes, and erroneous information published as fact in the newspapers To find otherwise would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge.") (citations omitted); In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 (2d Cir. 1988) ("Judicial inquiry may not . . . be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal."); United States v. Cooley, 1 F.3d 985, 994 n.5 (10th Cir. 1993) ("The mere fact that a defendant has made derogatory remarks about a judge is insufficient to convince a sane and reasonable mind that the attacked judge is biased or prejudiced. . . . The same is true regarding an objective person, knowing all the facts, assessing whether the judge's impartiality may *reasonably* be questioned. Any other conclusion would allow defendants to cause the recusal of judges simply by making scurrilous and disparaging remarks or charges about them. Permitting parties to manipulate the system with falsehoods or insults in such a manner would be a bizarre application of [the federal disqualification statute].") (citations and internal quotations omitted) (emphasis in original); United States v. Fujimoto, 101 F. Supp. 293, 296 (D. Haw. 1951) ("Only a psychic pleader could allege that because a defendant has published uncomplimentary statements concerning a judge, the latter will be unable to give his critic a fair and impartial trial. If such a fantastic procedure were permitted, a defendant could get rid of a judge by the simple expedient of publishing a scurrilous article, *truthfully* alleging that the article was published, and clinching the matter by asserting the bald conclusion that, since the article was uncomplimentary, the judge must of necessity be prejudiced against the publisher!") (emphasis in original); United States v. Garrison, 340 F. Supp. 952, 956 (E.D. La. 1972) ("Affiant's contention reduces itself to the proposition that he can avoid being tried before a particular judge if he has publicly voiced disapproval of that judge or that judge's work. . . . That simply is not the law"); United States v. Sinclair, 424 F. Supp. 715, 719 (D. Del. 1976) ("It has been universally held that even prior written attacks upon a judge by a party to a suit are legally insufficient to support a charge of bias on the part of the judge toward the author of such a statement.").

ORDER

For the reasons stated above, it is hereby **ORDERED** that the Commonwealth's motion for
recusal be and hereby is **DENIED**.

A handwritten signature in cursive script, reading "E. Susan Garsh", written over a horizontal line.

E. Susan Garsh
Justice of the Superior Court

Dated: October 24, 2013

#278.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

BRISTOL, SS SUPERIOR COURT
FILED

FEB 10 2015

COMMONWEALTH

vs.

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

AARON HERNANDEZ

**MEMORANDUM OF DECISION AND ORDER ON
CABLE NEWS NETWORK, INC.'S MOTION FOR
DAILY ACCESS TO EXHIBITS**

Cable News Network, Inc. ("CNN") sought an expedited hearing on its Motion for Daily Access to Exhibits, which the court allowed. In the interests of expedition, the court issued its decision orally immediately after hearing argument from the parties. The motion was denied.¹

No exhibits have been impounded. CNN's motion, while captioned as one for daily access to exhibits, at no point actually contends that it has been unable to receive daily access to all photographic and documentary exhibits, simply that it has not obtained full color photographs of such evidence or a copy of videotaped evidence by the end of the trial day.

For the following reasons, CNN's motion has been **denied**.

BACKGROUND

The motion is not supported by any affidavit. Pursuant to Superior Court Rule 9, "[i]n criminal cases the court need not hear any motion . . . grounded on facts unless the facts are

¹ CNN's Motion for Daily Access to Exhibits was filed on February 5, 2015. A hearing was held the next day. When the Court issued its oral ruling, it indicated that it did not intend to file a written decision, but would, instead, order a transcript, which it reserved the right to edit. The Court has taken advantage of the weather-related trial delays to instead issue a written decision.

verified by affidavit." Because of the importance of clarifying the level of access actually being granted, the court agreed to entertain the motion. Before discussing the controlling legal principles, it is helpful to set out some background information not contained in the motion.

This trial is taking place in a courtroom which has two 47 inch high-definition monitors specifically positioned for the public; they are on the wall directly in front of the bar. Smaller screens are in front of the jurors, the witness, at counsel table and on the bench. The images on the two large screens are clearly visible to all members of the public. Pursuant to SJC Rule 1:19, a television and still camera have been filming and taking pictures since the beginning of the trial, and, at times, a third web camera has been recording as well. As exhibits – photographic, documentary, and real evidence such as shell casings, projectiles, a baseball cap and a license – have been placed on a presenter, they were displayed, generally magnified, on the large screens. The authorized cameras can and have opted to capture the images on those screens in full color. To the extent that CNN may wish that the pool cameras would take more images of evidence appearing on the monitors, it must address such concern, if any, to the pool.

Twenty seats in the courtroom have been reserved for the media, not including four seats for the three pool cameras and a sound person. The media has had ample opportunity to see and to hear the evidence, including exhibits and the one videodisc played for the jury.

The clerk of courts has made extraordinary efforts to accommodate the public interest in this proceeding, taking the unusual step of assigning two full-time session clerks to this trial unless one is needed to cover another session because of absences. The result has been that, every single day since the first day of the trial, the public, including the media, has been able to obtain copies of all documentary and photographic exhibits. Daily copies of such exhibits have

been provided, and the court anticipates that, whenever it is feasible given the clerk's other responsibilities, such copies will continue to be provided at the end of the trial day.

The Clerk's office does not have a color copier to make color copies of exhibits.

To date, only one video clip has been played in court during the trial. A copy of that video clip was not provided by the end of the day. A copy was made available within approximately forty-eight hours. Some of the videos that may be introduced may turn out to be more difficult and more time consuming to copy than others. With respect to the one video clip that was marked as an exhibit, it was played in open court and an authorized television camera and a web camera, if present, were free to film the video clip in its entirety.

The pool cameras are situated in the courtroom in the locations that they requested during the pre-trial media meeting.

DISCUSSION

The media's right of access to judicial proceedings and records derives entirely from the public's right of access. The media has neither a greater nor a lesser right of access than any other member of the public. As the United States Supreme Court stated in Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978), a case holding that the media does not have a First Amendment right to obtain copies of exhibits admitted as evidence, "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public."

Following the holding in Warner Communications, Inc., other courts have held that the First Amendment is satisfied by the media's ability to be present in the courtroom when the exhibits are introduced and the recordings are played. In re Providence Journal Co., Inc., 293 F.3d 1, 16 (1st Cir. 2002); United States v. Sampson, 297 F. Supp.2d 342, 344 (D. Mass. 2003).

Moreover, here, unlike those federal cases, the media is not only able to be present in the courtroom when the exhibits are introduced but is also able to photograph those exhibits in color as they are put on the monitor.

There undoubtedly is a common law presumption of access to judicial documents relied upon in judicial proceedings that extends to exhibits admitted into evidence during a trial. In re Providence Journal, 293 F.3d at 9; Sampson, 297 F. Supp.2d at 345. This right, which originated with documentary evidence, has been extended to videotapes and audiotapes. In re Application of NBC, Inc., 635 F.2d 945, 950 (2d Cir. 1980). The Massachusetts cases cited by CNN recognize the common law right of access to judicial records but concern impoundment or sealing of records and do not address the parameters of the right as applied to trial exhibits.

In The Republican Co. v. Appeals Ct., 442 Mass. 218, 222 (2004), one of the Massachusetts cases cited by CNN, the Court's opinion contains the oft-cited quotation from Justice Holmes in Cowley v. Pulsifer, 137 Mass. 392, 294 (1884) to the effect that "[i]t is desirable that [judicial proceedings] should take place under the public eye . . . and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." This trial is taking place "under the public eye." Citizens who are not physically present in the courtroom are able to "satisfy [themselves] with [their] own eyes as to the mode in which a public duty is being performed" by seeing and hearing all the evidence, including exhibits as they are placed on the presenter, in real time and in color because the trial is being live streamed. Indeed, to the extent that individuals may not have the opportunity to watch in real time, they have the same ability to see and hear the evidence in color by accessing archived footage of the trial.

The right to inspect and copy judicial exhibits is not absolute. Decisions as to access are best left to the sound discretion of the trial judge, exercised in light of the relevant facts and circumstances of the particular case. Nixon v. Warner Communications, Inc., 435 U.S. at 599; United States v. Modarressi, 720 F. Supp. 16, 17 n.1 (D. Mass. 1988).

The First Circuit has stated that the trial court *may*, in its discretion, allow the media to copy tapes that have been admitted into evidence, but there is no requirement that the court *must* afford such access. In re Providence Journal, 293 F.3d at 16-17. As discussed in Sampson, 297 F. Supp.2d at 345-346, with respect to recordings, courts have exercised their discretion in various ways; in some instances, the recordings have not been made available to the media; in some cases they have been provided to the media after the proceedings in which they were evidence concluded, and in other cases they were released while a prosecution was still in progress.

CNN concedes, as it must, that a trial judge, in the interest of the fair administration of justice, may impose reasonable time, place, and manner limitations on the media's access to judicial records. Where the exhibits are not in a form so as to be easily copied, the court may deny copying based on administrative difficulties. See, e.g., In re Providence Journal, 293 F.3d at 16-17 (stating that the trial court did not abuse its discretion in denying the media's request to copy videotapes and audiotapes where the state introduced only selected excerpts during the trial using a specialized software program and it was not administratively feasible for the clerk's office to create a CD containing only those excerpts played in open court); United States v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986) (stating that, in denying access to surveillance tapes played at trial, trial court properly could have considered administrative difficulties because parts of tape were not admitted into evidence and copying would adversely affect progress of the trial); United States v. Rosenthal, 763 F.2d 1291, 1294-1295 (11th Cir. 1985) (stating that trial

court may consider whether contemporaneous access will be administratively difficult and disrupt progress of trial); United States v. Criden, 648 F.2d 814, 823-824 (3d Cir. 1981) (photocopying of tapes should be permitted as long as equipment does not occupy an unreasonable amount of working space or unreasonably interfere with the regular routine of the office involved and does not damage or impair the physical records or their contents).

CNN cites no case for the proposition that its common law right of access mandates the clerk to provide it with color copies of color photographs marked as exhibits even when those photographs have been displayed in open court, photographed by the media in court in color, and the clerk's office does not possess a color copier.

CNN cites no case for the proposition that its common law right of access mandates the clerk – irrespective of its resources – to provide CNN by the close of each day copies of all documentary, photographic, and video recordings introduced into evidence that same day. Here, through extraordinary dint of effort, the clerk of courts has, in fact, provided copies of all documentary and photographic evidence in that time frame, and it provided a copy of the videoclip introduced into evidence within two days.

CNN cites Sampson as a case “authorizing access to admitted recordings ‘at the conclusion of each trial day.’” In CNN’s motion, the phrase “at the conclusion of each trial day” appears as a quote from Sampson. The quotation is taken out of context and does not support CNN’s position. What the Court in Sampson actually ruled is: “In this case, the court will require written requests for the recordings at the conclusion of each trial day. The compact discs which contain the recordings will be duplicated by the staff of the District Court as quickly as their other important responsibilities permit.” Sampson, 297 F. Supp. 2d at 347-348. CNN is

entitled to nothing more than duplication, where feasible, as quickly as the clerk's other important responsibilities allow.

United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985), also relied upon by CNN, is inapposite. That case concerned an order excluding a single reporter from access to trial exhibits as a form of discipline of that reporter. The Court recognized that a trial judge has discretion to manage her courtroom and to control access to trial exhibits if that aids in the conduct of an orderly trial. CNN has not been treated differently than any other member of the media.

CNN's request that, in the presence of court staff, at the end of each trial day, it be allowed to (1) take physical possession of color photographs marked as exhibits so that it can run them through a color scanner, (2) take physical possession of video footage marked as exhibits so it can download or otherwise reproduce them, and (3) inspect and photograph all other exhibits is unreasonable. While CNN may be prepared, as it states, to share and coordinate its access with other media entities, it is not only media entities that have a common law right of access. If CNN were to be allowed to directly inspect and to itself photocopy, photograph or download exhibits after the trial day ends, so would any other interested member of the public.

CNN argues that there are no compelling circumstances that justify restricting CNN to something less than complete daily access to all trial exhibits. When the phrase "complete daily access" is defined as allowing a member of the media to handle trial exhibits, there most certainly are compelling circumstances. Allowing any third party – media or non-media – to touch or otherwise handle exhibits in an ongoing trial risks damaging or altering the evidence and compromising the integrity of the exhibits, jeopardizing the defendant's Sixth Amendment rights, disrupting the efficient performance of justice, and creating obvious problems for clerk in carrying out his statutory mandate to preserve the integrity of the evidence. Although the court in

NBC, Inc., 635 F.2d at 945, 952, n. 6, did not disapprove of a procedure by which the networks would be allowed to copy tapes during a trial, all parties acknowledging that it would pose no risk to the integrity of the tapes, here the parties do not agree that the procedure CNN seeks the court to allow would pose no risk to the integrity of the evidence. The defendant has opposed CNN's motion. The clerk is required by statute to have the care and custody of all the records, books, and papers which pertain to or are filed or deposited in their respective offices and to preserve all the files and papers of all sessions of the court. G.L. c. 221, §§ 2, 14. Nothing in NBC, Inc. mandates that a court, as a matter of constitutional or common law, adopt the procedure referenced in the footnote in that case. Further, unlike the media in NBC, Inc., the media here has the chance to listen to and to record the images and sound as video exhibits are played for the jury.

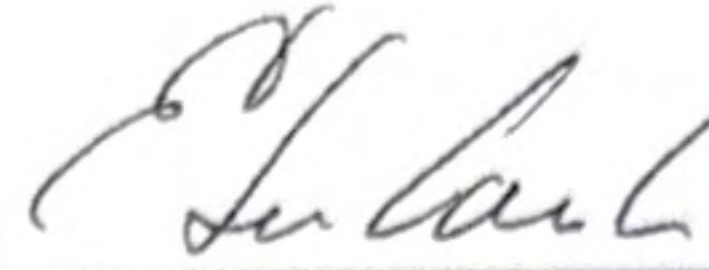
The NBC, Inc case also does not address the right of a member of the public, such as CNN, to make its own photocopies or downloads or to photograph all exhibits outside of the courtroom. By statute, the clerk is required only to "make copies of all papers on file," G.L. c. 221, § 2, not to physically display exhibits outside the courtroom.

Photographs are not allowed to be taken anywhere in this courthouse in any case by anyone, except as permitted by SJC Rule 1:19. That rule allows photographs to be taken only during proceedings and only by one still camera, one television camera, and one web camera. During the course of this trial, CNN is entitled to nothing more under the First Amendment, the common law or Rule 1:19.

For all these reasons, the court orally denied CNN's request that the press be afforded the opportunity to inspect, photocopy, photograph or download each exhibit entered into evidence at the conclusion of each trial day.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Cable News Network, Inc.'s Motion For Daily Access to Exhibits be **DENIED**.



E. Susan Garsh
Justice of the Superior Court

DATED: February 10, 2015



**Request and Order for
Media Coverage of Court Proceedings**

I request that the court permit electronic media coverage of the hearing identified below. I certify that if the court grants this request, all participating personnel in this media agency will be informed of and will abide by all court orders and rules, including CJA Rule 4-401.01.

Mar 16, 2023 06:14PM

Date and Time Request Submitted to the Court

Brady McCombs

Person Submitting Request

The Associated Press

Media Agency

Assistant News Director

Position in Media Agency

801-783-6619

Telephone

bmccombs@ap.org

Email Address

Kent R. Holmberg

Name of Judge

March 21 at 9:00 a.m.

Date and Time of Hearing

190500048 Terry Sanderson vs Gwyneth Paltrow

Case Name and Number



Newspaper-still



TV/newspaper-video



Radio Station

☒ I have read and understand the Decorum Order that has been issued in this case:

Brady McCombs

Court Order

(1) ☒ **The request is granted.**

(2) The news reporter must share all photographs, video and/or audio with other media organizations
As per the rule there will be no:

- ✓ media coverage of a juror or prospective juror until the person is dismissed;
- ✓ media coverage of a person who is a minor;
- ✓ media coverage of exhibits or documents not in the official public record;
- ✓ audio recording or transmission of the content of bench conferences;
- ✓ audio recording or transmission of the content of confidential communications between counsel and client, between clients, or between counsel;

Additional exclusions for this hearing are as follows:

- ☐ electronic media coverage of witnesses;
- ☐ electronic media coverage of victims;
- ☐ electronic media coverage of victims' family members;
- ☐ electronic media coverage of _____

Except as follows:

See attached Supplemental Conditions (Still-photography)

(3) ☐ **The request is denied.** The following reasons for prohibiting electronic media coverage are sufficiently compelling to outweigh the presumption in favor of electronic media coverage.

Date:

March 18, 2023

Sign here ▶

Kent Holmberg

SUPPLEMENTAL CONDITIONS

to the

Order for Media Coverage of Court Proceedings for Court TV (Newspaper-still photography)

1. Decorum Order issued in this case (current Decorum Order is dated March 8, 2023)
2. Two cameras for newspaper-still photography are permitted. Locations to be approved by the court or public information officer Tania Mashburn.
 - a. The attorneys may be photographed during opening statements and during closing arguments.
 - b. During questioning. The cameras will be permitted to capture the witness being examined, the questioning attorney at the lectern and the judge as needed.
 - c. Counsel tables. No media coverage of counsel tables except when an attorney makes an objection and only so long as necessary to show the objection and any response to the objection.
 - d. Entering and exiting the courtroom. The parties and counsel may be photographed entering and exiting the courtroom at the beginning of the day, at lunch recess and at the end of the day.
3. This Order permits still photography. The taking of still photography will have to be accomplished so as not to distract from the court proceeding in any way. It is anticipated by the court that the still cameras will be operated remotely and positioned next to the two cameras that have been approved for CourtTV for video. During the trial there will be no moving around the courtroom, no camera movement, no flash, and no noise associated with the still photography. Still photography will be limited as necessary to achieve these goals.



**Request and Order for
Media Coverage of Court Proceedings**

I request that the court permit electronic media coverage of the hearing identified below. I certify that if the court grants this request, all participating personnel in this media agency will be informed of and will abide by all court orders and rules, including CJA Rule 4-401.01.

Mar 16, 2023 06:14PM

Date and Time Request Submitted to the Court

Brady McCombs

Person Submitting Request

The Associated Press

Media Agency

Assistant News Director

Position in Media Agency

801-783-6619

Telephone

bmccombs@ap.org

Email Address

Kent R. Holmberg

Name of Judge

March 21 at 9:00 a.m.

Date and Time of Hearing

190500048 Terry Sanderson vs Gwyneth Paltrow

Case Name and Number



Newspaper-still



TV/newspaper-video



Radio Station

☒ I have read and understand the Decorum Order that has been issued in this case:

Brady McCombs

Court Order

(1) ☒ **The request is granted.**

(2) The news reporter must share all photographs, video and/or audio with other media organizations
As per the rule there will be no:

- ✓ media coverage of a juror or prospective juror until the person is dismissed;
- ✓ media coverage of a person who is a minor;
- ✓ media coverage of exhibits or documents not in the official public record;
- ✓ audio recording or transmission of the content of bench conferences;
- ✓ audio recording or transmission of the content of confidential communications between counsel and client, between clients, or between counsel;

Additional exclusions for this hearing are as follows:

- ☐ electronic media coverage of witnesses;
- ☐ electronic media coverage of victims;
- ☐ electronic media coverage of victims' family members;
- ☐ electronic media coverage of _____

Except as follows:

See attached Supplemental Conditions (Still-photography)

(3) ☐ **The request is denied.** The following reasons for prohibiting electronic media coverage are sufficiently compelling to outweigh the presumption in favor of electronic media coverage.

Date:

March 18, 2023

Sign here ▶

Kent Holmberg

SUPPLEMENTAL CONDITIONS

to the

Order for Media Coverage of Court Proceedings for Court TV (Newspaper-still photography)

1. Decorum Order issued in this case (current Decorum Order is dated March 8, 2023)
2. Two cameras for newspaper-still photography are permitted. Locations to be approved by the court or public information officer Tania Mashburn.
 - a. The attorneys may be photographed during opening statements and during closing arguments.
 - b. During questioning. The cameras will be permitted to capture the witness being examined, the questioning attorney at the lectern and the judge as needed.
 - c. Counsel tables. No media coverage of counsel tables except when an attorney makes an objection and only so long as necessary to show the objection and any response to the objection.
 - d. Entering and exiting the courtroom. The parties and counsel may be photographed entering and exiting the courtroom at the beginning of the day, at lunch recess and at the end of the day.
3. This Order permits still photography. The taking of still photography will have to be accomplished so as not to distract from the court proceeding in any way. It is anticipated by the court that the still cameras will be operated remotely and positioned next to the two cameras that have been approved for CourtTV for video. During the trial there will be no moving around the courtroom, no camera movement, no flash, and no noise associated with the still photography. Still photography will be limited as necessary to achieve these goals.

#183

DEC 12 2014

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE
BRISTOL, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

ORDER REGARDING PROTOCOL, PUBLIC ATTENDANCE, AND MEDIA COVERAGE

Bristol County Superior Court Courtroom 7, or such other room as may be utilized for any proceeding in this case, is an open courtroom for purposes of this trial pursuant to the constitutional rights of the parties and the public to open trials. In order to ensure the safety and well-being of all trial participants, conformity with Supreme Judicial Court Rule 1:19, and the dignity of the proceedings, the Court enters the following orders, which apply to all members of the public, including members of the news media, unless otherwise specified:

1. No person wearing clothing, or a button or other object attached to clothing, or carrying an object that displays any Patriots or other NFL team logo, football-related insignia, or words and/or a photograph that relate in any way to this case will be permitted entry to the Fall River Justice Center during any phase of the trial.
2. In accordance with the Fall River Justice Center's Policy prohibiting the bringing of cell phones, cameras, and electronic devices into the courthouse, absolutely no photographic or electronic recording devices (including still and video cameras, cell phones, smart phones, tablets, laptops, watches with photographic or communication capabilities, audio recording or transmitting devices, or any other electronic device with communication capabilities) will be allowed into the Fall River Justice Center unless permitted by that Policy.
3. To the extent that the Policy permits some persons other than members of the media registered with the Public Information Office of the Supreme Judicial Court pursuant to Rule 1:19 to bring cell phones, cameras and electronic devices into the courthouse, such persons

shall not take any photographs, or make any recording or transmission by electronic means, in any courtroom or anywhere else in the courthouse.

4. No person shall contact, interview, or communicate with a juror prior to the discharge of the jury or harass or tamper with a juror.
5. It is anticipated that groups of summonsed jurors will complete questionnaires in the Jury Pool Room on January 9, 12 and 13, 2015. Before the jurors are asked to complete the questionnaires, the Court will briefly address the jurors in the presence of counsel and the defendant. Given the space constraints, there are only approximately 25 standing-room-only spots, which will be filled on a first-come basis with no reserved spots except 5 for the defendant's family and friends and 5 for the decedent's family, friends and victim witness advocate. A person who leaves the Jury Pool Room will not be permitted to reserve his/her space.
6. Given the prohibition in Rule 1:19 against photography, electronic recording, or transmission of voir dire hearings, on January 9, 12 and 13, 2015, members of the news media, like other members of the public, will not be permitted to bring cell phones, cameras, or electronic devices into the courthouse (including still and video cameras, cell phones, smart phones, tablets, laptops, Google glasses, watches with camera or communication capabilities, audio recording or transmitting devices, or any other electronic device with communication capabilities).
7. Once the judge, counsel, clerk and defendant depart from the Jury Pool Room, no member of the public may remain in that room.
8. In the event that overflow space is required, some summonsed jurors may complete questionnaires in a courtroom outside the presence of the judge, counsel and the defendant. Should that occur, no member of the public will be allowed to be present in that courtroom.¹
9. The Court expects to be conducting individual voir dire of prospective jurors in an open courtroom, Courtroom 7, beginning on January 16, 2015 and continuing day-to-day until a jury has been sworn. Except for a brief time at the start of the day during which jurors may come into Courtroom 7 as a group to be greeted by the court, the approximately 61 seats in Courtroom 7 will be filled during individual voir dire on a first-come basis with no reserved seats except 9 for the defendant's family and friends and 9 for the decedent's family, friends or victim witness advocate. A person who leaves the courtroom will not be permitted to reserve his/her seat. The seats will be allocated on a first-come basis.

¹ If any hearings take place in a different courtroom while the jurors are completing their questionnaires, members of the news media registered with the Public Information Office pursuant to Rule 1:19 will be afforded a brief opportunity to retrieve photographic or electronic recording devices.

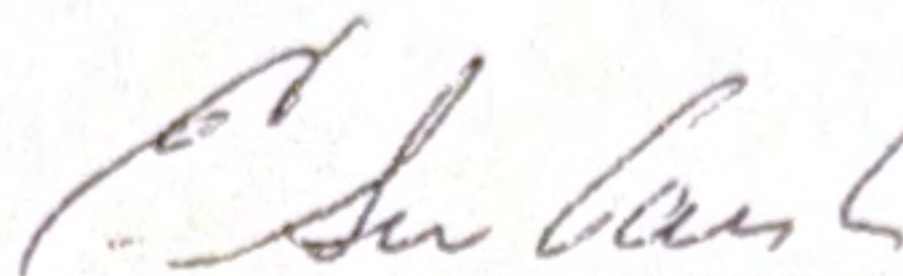
10. Given the prohibition in Rule 1:19 against photography, electronic recording, or transmission of voir dire hearings and because the Court Officers cannot realistically be expected to monitor individual compliance with this Rule while performing all of their other duties during the voir dire, members of the news media, like other members of the public, will not be permitted to bring cell phones, cameras, or electronic devices into the courthouse (including still and video cameras, cell phones, smart phones, tablets, laptops, Google Glasses, watches with camera or communication capabilities, audio recording or transmitting devices, or any other electronic device with communication capabilities) during any portion of the voir dire proceeding.
11. A courtroom other than Courtroom 7 will be utilized during the individual voir dire to hold jurors waiting to be interviewed. No member of the public will be permitted access to that courtroom during that time.
12. During each of the trial days, once a jury has been selected, seats will be allocated in Courtroom 7 as follows: 9 to the defendant's family or friends; 9 to the decedent's family, friends, or victim witness advocate; 3 for camera operators allowed by Rule 1:19 and Paragraph 20 of this Order; 20 to members of the news media (one seat per news organization); 20 to other members of the public. The seats will be allocated each day on a first-come basis. A person who leaves the courtroom will not be permitted to reserve his/her seat.
13. After the jury has been selected, members of the news media who have registered with the Public Information Office pursuant to Rule 1:19 will be permitted to bring into Courtroom 7 photographic and electronic recording devices (excluding Google Glasses). All devices must be put in silent mode. The operator of any device that produces distracting noise must turn the device off when so requested by a Court Officer.
14. There shall be no photography or electronic recording or transmission of voir dire hearings concerning jurors or prospective jurors.
15. There shall be no electronic recording or transmission of bench and side bar conferences, conferences between counsel, and conferences between counsel and client.
16. There shall be no photography of jurors and prospective jurors, including on any court-conducted views.
17. There shall be no photographing or electronic recording in the courtroom before or after a proceeding or during any breaks in the proceeding.
18. There shall be no photographing or electronic recording outside the courtroom in the courthouse.

19. During any court-conducted view, the public must remain at least 25 yards away from the jurors.
20. The only cameras permitted to be used in Courtroom 7 during the trial are: (1) one stationary, mechanically silent, video camera designated for broadcast television, (2) a second stationary, mechanically silent, video camera designated for Web use; and (3) a third mechanically silent still camera. Such equipment and the operators can only be situated in the area of the courtroom designated for camera use. All cameras must be set up before the start of the court session and dismantled only during a court break. Movement shall be kept to a minimum. Removal of equipment will not be permitted while the trial is in session under any circumstances. The operator shall not interrupt the court proceeding with a technical problem.
21. All other registered members of the news media must sit in the area of Courtroom 7 designated for the media.
22. Pursuant to Rule 1:19(2)(f), members of the news media seeking to photograph or electronically record permissible trial proceedings shall kindly make pooling or cooperative use arrangements among themselves outside of the courtroom prior to the beginning of the particular court session.
23. The Court anticipates that, once the jury has been selected, the Law Library will be utilized as an overflow room, in which members of the public can see and hear what is taking place in Courtroom 7. Access to the Law Library during the trial will be on a first-come basis.
24. Members of the news media who have registered with the Public Information Office pursuant to Rule 1:19 will be permitted to bring cell phones, photographic and electronic recording devices (excluding Google Glasses) into the Law Library. No cameras, however, can be used in the Law Library.
25. During the trial, members of the news media must sign in with an assistant clerk who will be stationed at a table just past the security entrance in the lobby and provide proof of registration with the Public Information Office pursuant to Rule 1:19, at which time such person will be asked, at least once, to complete a form certifying that they have read Rule 1:19 and will comply in all respects with the provisions of that rule. Members of the media who are present at the media meeting on January 6, 2015 can complete the form to be used in this case at that time.
26. Members of the public may enter the courthouse at 8:00 AM.
27. Court Officers are authorized by this Order to secure any area which they deem appropriate to ensure the well-being and personal privacy of jurors or prospective jurors.

28. Court Officers are authorized to exclude or eject any person whom they, in their discretion, have reason to believe is not complying fully with this Order.

A meeting with representatives of the news media is scheduled for January 6, 2015 at 2:00 PM, prior to the start of the trial, at which time any issues raised by this Order may be addressed.

SO ORDERED.



E. Susan Garsh
Justice of the Superior Court

Dated:

12/12/14